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In the Supreme Court of the United States

EDWARD ALAMEIDA, WARDEN, *Petitioner,*

v.

KEVIN PHELPS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEVIN PHELPS,
Petitioner-Appellant,

v.

EDWARD ALAMEIDA,
Respondent-Appellee.

No. 07-15167

D.C. No. CV-98-02002-MMC

OPINION

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Argued and Submitted
January 13, 2009—San Francisco, California

Filed June 25, 2009

Before: Myron H. Bright,* Stephen Reinhardt and
A. Wallace Tashima, Circuit Judges.

Opinion by Judge Reinhardt

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* The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation

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OPINION

REINHARDT, Circuit Judge:

For over eleven years, Kevin Phelps has sought to present his petition for *habeas corpus* to a federal judge. For over eleven years, he has been unsuccessful. Given the trend these last decades on the part of Congress and the Supreme Court "increasingly to bar the federal courthouse door to litigants with substantial federal claims,"[1] *habeas* petitioners — including petitioners who may have suffered severe deprivations of their constitutional rights — now face myriad procedural hurdles specifically designed to restrict their access to the once-Great Writ. In this modern era, which prizes "efficiency," "parity," and "judicial economy" often at the expense of justice and liberty, it is not at all unusual for an individual who fails to satisfy one of those many procedural hurdles to toil on for years in hopeless pursuit of an opportunity to be heard on the merits of his claim — an opportunity that he will never receive. It is, however, very unusual for an individual who meticulously *has* overcome each of those procedural hurdles to sit in prison for more than a decade nonetheless, without ever being heard on the substance of his petition. That, however, is exactly what has happened to Kevin Phelps.

At each stage in Phelps' struggle over the past eleven years to have his federal *habeas* petition

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[1] *Juidice v. Vail*, 430 U.S. 327, 346 (1977) (Brennan, J., dissenting, joined by Marshall, J.)

evaluated on the merits, he has put forward sound legal arguments, at times doing so *pro se*, for why his petition was timely filed. In fact, his arguments have been much more than sound — they have been *undeniably correct* under *currently* governing law. Phelps' one and only fault throughout this protracted process, if it can be described as a "fault" at all, is that his arguments have been overly prescient: On multiple occasions, the legal arguments that Phelps put forward for why his petition was properly filed were rejected by the judges before whom he appeared, only to be fully embraced within a matter of months by judges authoring a more authoritative, controlling opinion in a different case. The positions Phelps advanced were not, at the time they were made, foreclosed by then-governing precedents; to the contrary, when Phelps presented his arguments the law was simply *unsettled* with respect to the procedural hurdles standing in his way. However, the law did not remain unsettled for long: on multiple occasions, shortly after Phelps advanced the precise interpretation of the law that would soon be adopted, his position was vindicated in a case other than his own. On each occasion, the argument Phelps advanced was adopted as the governing legal rule mere months after a directly contrary, but nonprecedential, ruling was entered against him.

In short, entirely as a result of misfortune, Phelps sits today in prison without a single federal judge ever having evaluated the substance of his petition for habeas corpus, a petition that indisputably satisfies the strict procedural requirements set forth in the Anti-Terrorism and Effective Death Penalty Act. Even under the severely diminished *habeas corpus* protection available under that Act, a properly filed *habeas* petition should not be dismissed on the basis of sheer happenstance or of random bad luck. "The writ of *habeas corpus* plays a vital role in protecting constitutional rights," AEDPA notwithstanding.[2] In

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[2] *Slack v. McDaniel*, 529 U.S. 473, 483 (2000).

enacting the *habeas* statute, many years prior to the adoption of AEDPA, "Congress sought to 'interpose the federal courts between the States and the people, as guardians of the people's federal rights — to protect the people from unconstitutional action.' "[3] As the Supreme Court warned, "[d]ismissal of a *first* federal *habeas* petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty."[4] That was true in 1996, when AEDPA was enacted, and it is true today. In fact, it is frequently also true with respect to the dismissal of a second or subsequent habeas petition when reaching the merits would allow the courts to remedy a serious injustice.

When a dismissal of a *habeas* petition rests upon an answer to an open legal question that is promptly rejected and then replaced in a more authoritative opinion by the very answer proposed by a diligent but unsuccessful petitioner, the petitioner is entitled to seek reconsideration of the dismissal entered against him. In weighing such a request for reconsideration, a district court must evaluate the specific circumstances of the case at hand and should be guided by a number of factors discussed later in this opinion; the court should not treat the motion for reconsideration as *per se* non-cognizable. Ultimately, in evaluating the motion, the district court's overriding concern should be "the incessant command of the court's conscience that justice be done in light of all the facts."[5] Here, because the district court incorrectly applied a per se rule to reject Phelps' motion for reconsideration rather than evaluating the specific circumstances of Phelps' case, and because we conclude that the extraordinary circumstances of this case merit relief under Fed. R.

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[3] *Reed v. Ross*, 468 U.S. 1, 10 (1984) (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972)).

[4] *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) (emphasis added).

[5] *Stokes v. Williams*, 475 F.3d 732, 736 (6th Cir. 2007).

Civ. P. 60(b)(6), we reverse the denial of Phelps' motion for reconsideration and remand for an evaluation of the merits of his *habeas* petition.

I.

Phelps' prolonged journey through the state and federal post-conviction processes has involved numerous twists and turns. Because this case turns largely on the details of his efforts over the past decade to have the substance of his federal petition for *habeas corpus* reviewed by a federal judge, we recount in full the procedural history that has brought him, and us, to this point.

Phelps was prosecuted for the same murder three separate times in the California state courts. His first two trials resulted in hung juries. In the third trial, which concluded on November 17, 1994, Phelps was convicted. He was sentenced to a term of thirty-years to life in prison.

Following his conviction, Phelps simultaneously filed an appeal and a petition for a writ of *habeas corpus* in the California Court of Appeal.[6] The court denied his appeal on October 28, 1996 and denied his *habeas* petition on February 6, 1997. Phelps then petitioned the California Supreme Court for review of both denials. The Supreme Court denied the petition for review of his direct appeal on January 15, 1997,

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[6] In California, the Court of Appeal and the Supreme Court both have original jurisdiction over *habeas* petitions. Unlike in other states, both appellate courts regularly exercise that original jurisdiction in the ordinary course of reviewing claims for post-conviction relief. The California Supreme Court also has appellate jurisdiction over habeas petitions denied by the Court of Appeal, which it exercises in much the same fashion that it exercises its original *habeas* jurisdiction. *See generally Carey v. Saffold*, 536 U.S. 214 (2002) (describing California state *habeas* system and comparing it to other states). We discuss the relationship between the California Supreme Court's original and appellate jurisdiction over *habeas* petitions in greater detail *infra* Part II.A.

stating "Appellant's petition for review DENIED." *People v. Phelps*, No. S049538, 1997 Cal. LEXIS 63 (Cal. Jan. 15, 1997). With respect to his *habeas* petition, the court denied the petition for review on April 30, 1997, stating "Petition for review denied on the merits." *In re Phelps*, No. S059148, 1997 Cal. LEXIS 2441 (Cal. April 30, 1997).

On May 15, 1998, one year and fifteen days after the petition for review of the *habeas* petition was denied on the merits, Phelps filed a petition for a federal writ of *habeas corpus* in the Northern District of California. In that petition, he asserted that his constitutional rights were violated because exculpatory evidence discovered after his trial entitled him to a new trial and because his trial lawyer had provided ineffective assistance of counsel. The State responded by filing a motion to dismiss the petition on the ground that it was untimely under AEDPA, 28 U.S.C. § 2244(d), which imposes a one-year statute of limitations on federal *habeas* petitions. That one-year period begins to run when the petitioner completes the state appellate process, but excludes any time during which he has a pending petition for collateral review before the state courts. Because Phelps' state *habeas* petition was still pending before the California Supreme Court at the time his direct appeal became final, the AEDPA statute of limitations did not start to run until that court's review of his state *habeas* petition became final. *See* 28 U.S.C. § 2244(d)(2). The date on which that occurred was a central dispute before the district court.

As noted above, on April 30, 1997, the California Supreme Court denied review of Phelps' appeal from the Court of Appeal's denial of his state *habeas* petition. Under the California Rules of Court then in effect, "A *decision* of the Supreme Court becomes final thirty days after filing . . . . An *order* of the Supreme Court denying a petition for review of a decision of a Court of Appeal becomes final when it is filed." Cal. R. Ct. 24(a) (repealed Jan. 1, 2002)

(emphases added).[7] Thus, if the denial of Phelps' petition for review was a "decision," it did not become final until May 30, 1997, thirty days after its filing date, and his federal *habeas* petition filed on May 15, 1998 was filed with fifteen days to spare. However, if the Supreme Court's denial was an "order . . . denying a petition for review," then it became final when filed on April 30, 1997, and Phelps' federal *habeas* petition was fifteen days late.

Phelps argued to the district court that the California Supreme Court's summary denial of his petition for review was a decision because, in the Supreme Court's own words, it was a denial "on the merits." By way of contrast, he pointed to the denial of the petition for review of his direct appeal, which simply stated "DENIED." The State countered that, under California habeas law, only those dispositions issued by the California Supreme Court following an order to show cause are deemed "decisions."[8] The district court acknowledged that "the California courts have not clearly articulated the difference between a *decision* and an *order* in the context of Rule 24(a)," but it nonetheless agreed with the State that, because the Supreme Court had not issued an

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[7] In 2002, Rule 24 was amended so as to make "[t]he denial of a petition for review of a Court of Appeal decision" "final on filing," regardless of whether the denial was decided on the merits. *See* Cal. R. Ct. 29.4 (recodified at Cal. R. Ct. 8.532 in 2007). That amendment has no bearing on this appeal because the finality of the California Supreme Court's denial of Phelps' request for review is governed by the rules in effect at the time of that court's ruling.

[8] Ordinarily, if the California Supreme Court believes that a petitioner has established "a *prima facie* case for relief on *habeas corpus*, then an order to show cause" why the petition should not be granted will be issued to the State Attorney General. *In re Lawler*, 588 P.2d 1257, 1259 (Cal. 1979). However, if the Supreme Court believes the petition does not state a *prima facie* case, then it will issue a "summary denial," as it did in this case, which is a denial on the merits of the claim. *In re Clark*, 855 P.2d 729, 741 n.9 (Cal. 1993).

order to show cause in Phelps' case, the denial of review was an order, not a decision. *Phelps v. Alameda*, No. 98-2002-MMC, slip op. at 3 (N.D. Cal. Dec. 28, 1998) (order granting motion to dismiss). Accordingly, the district court held that Phelps' federal habeas petition was barred by the statute of limitations.[9] *Id.*

Phelps appealed the district court's dismissal to this court on January 26, 1999, pressing the argument that the California Supreme Court's denial of his petition for review was a decision under the California Rules of Court and therefore did not become final until thirty days after filing. In an unpublished memorandum disposition, a panel of this court affirmed the district court, holding that the California Supreme Court's "denial was an 'order denying a petition for review' " because it had not been preceded by an order to show cause. *Phelps v. Alameda*, No. 99-15493, 2000 U.S. App. LEXIS 5954, at *2 (9th Cir. Mar. 29, 2000). After the panel filed its memorandum disposition, Phelps petitioned for rehearing and rehearing en banc and also petitioned for a writ of certiorari from the United States Supreme court, but he was unsuccessful with respect to all. *See Phelps v. Alameda*, No. 99-15493 (9th Cir. May 8, 2000) (order denying petition for rehearing and petition for rehearing en banc), *cert. denied*, 531 U.S. 1073 (2001).

At the time Phelps' appeal was before this court, the question of how to construe summary denials by the California Supreme Court for purposes of AEDPA's statute of limitations was an open one. In fact, when Phelps' appeal was under submission before the panel of this court reviewing his case, a separate panel was addressing precisely the same question in a different appeal. That panel reached the direct opposite result. In an unpublished memorandum disposition, that panel held that "[s]ummary denials are 'decisions' under California

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[9] Phelps also raised an equitable tolling argument that the district court rejected in a decision that we affirmed.

law," and therefore do not become final until thirty days after filing. *Washington v. Lindsey*, No. 99-55149, 2000 U.S. App. LEXIS 9015, at *4 (9th Cir. May 4, 2000). Three months later, yet another panel of our court reached that same conclusion, also in an unpublished memorandum disposition. *See Morgan v. Fairman*, No. 99-55446, 2000 U.S. App. LEXIS 20997 (9th Cir. Aug. 15, 2000). Had Phelps' appeal been assigned to either of these other panels, his argument that his petition was timely filed would have prevailed and his constitutional claims would have been considered on the merits.

The contradiction between these various competing memorandum dispositions was definitively resolved fifteen months after Phelps' appeal became final. In *Bunney v. Mitchell*, 262 F.3d 973 (9th Cir. 2001) (per curiam), a panel of this circuit issued a published, and therefore controlling, opinion that resolved the dispute over whether summary denials by the California Supreme Court are decisions or orders for purposes of calculating the AEDPA statute of limitations. That panel adopted the position Phelps had advocated all along, holding that "[u]nder Rule 24 [of the California Rules of Court], a denial of a *habeas* petition . . . is not final for 30 days" after filing. *Id.* at 974. That decision and a series of Ninth Circuit cases that followed quickly in its wake, including a case decided en banc, made perfectly clear that the position Phelps advocated before the district court and before this court was legally correct. Had *Bunney* and its progeny resolved a few months earlier the unsettled legal question upon which Phelps' appeal turned, his *habeas* petition would have been remanded to the district court for a decision on the merits.

Shortly after Phelps' position was vindicated in *Bunney*, he filed a motion pursuant to Fed. R. Civ. P. 60(b) asking the district court to reconsider its dismissal of his *habeas* petition on the ground that, in light of the intervening change in the law, it would be unjust not to review the merits of his constitutional claims when he had correctly and consistently asserted the timeliness of his petition at

every stage of his case. However, the district court, over Phelps' thoroughly briefed objection, denied his motion to reopen on the ground that it was a "second or successive" *habeas* petition. Under 28 U.S.C. § 2244(b)(3)(A), "[b]efore a second or successive [*habeas*] application . . . is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." Because Phelps had not petitioned this court for permission to file his Rule 60(b) motion, and because the district court considered that motion to be a successive *habeas* petition, the court ruled that, "[a]t this juncture, . . . this Court lacks subject matter jurisdiction to determine whether the change in the law would entitle petitioner to relief." *Phelps v. Alameda*, No. 98-2002-MMC, slip op. at 2 (N.D. Cal. Mar. 26, 2002) (order denying motion to reinstate). Accordingly, the court denied Phelps' motion for reconsideration. With respect to the merits of the motion, the court also stated that "a change in the applicable law after a judgment has become final in all respects is not a sufficient basis for vacating the judgment." *Id.* (internal quotation marks omitted) (quoting *Tomlin v. McDaniel*, 865 F.2d 209, 210 (9th Cir. 1989)).

Phelps asked the district court to issue a certificate of appealability allowing him to appeal the rejection of his Rule 60(b) motion, but it declined to do so. Phelps then petitioned this court for a certificate of appealability, which was granted with respect to the following question: did the district court err in construing Phelps' Rule 60(b) motion as a successive *habeas* petition? *Phelps v. Alameda*, No. 02-15821 (9th Cir. Dec. 2, 2002) (order granting certificate of appealability). The case was then assigned to a panel for consideration of that question. The panel, in a published opinion, however, dismissed the certificate of appealability as improvidently granted and thereupon dismissed the appeal. *See Phelps v. Alameda*, 366 F.3d 722 (9th Cir. 2004). In reaching its conclusion, the panel construed the district court's order denying Phelps' Rule 60(b) motion as containing two independent

"alternative holdings": (1) a holding that the district court lacked jurisdiction to consider the motion, and (2) a holding that the motion could not be granted on its merits. *Id.* at 725 & n.3. Curiously, the panel arrived at its conclusion despite unequivocal Supreme Court and Ninth Circuit precedents rejecting the doctrine of "hypothetical jurisdiction." These precedents clearly hold that a court has *no power* to render a "holding" on the merits of a question that it lacks jurisdiction to consider.[10] *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998); *Rivera v. RRB*, 262 F.3d 1005, 1008 (9th Cir. 2001). *But cf. Kramer v. Gates*, 481 F.3d 788, 791 (D.C. Cir. 2007). Notwithstanding these precedents, the panel held that the district court's denial of Phelps' motion rested on two independent grounds, one of which was lack of jurisdiction. The panel then stated that the question of jurisdiction was the subject of the certificate of appealability. It went on to hold that even if it were to rule in Phelps' favor on the certified question of jurisdiction, the uncertified "alternative holding" denying him relief on the merits would still stand. Accordingly, the panel held that it could not grant Phelps any meaningful relief however it resolved the

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[10] It is difficult to reconcile the panel's construction of the district court's order with the clear prohibition against hypothetical jurisdiction: "Because the [district] court concluded it did not have jurisdiction . . . , [its] reaching an alternative holding would have been an exercise of hypothetical jurisdiction in violation of *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 94, (1998)." *United States v. Mitchell*, 518 F.3d 740, 744 n.6 (10th Cir. 2008). *But cf. Lesesne v. District of Columbia*, 447 F.3d 828, 833 (D.C. Cir. 2006). The appropriateness of the panel's analysis, however, is not before us on this appeal, and accordingly we do not revisit the panel's conclusions; we note the apparent tension in its logic only to further underscore the multitudinous, and at times unwarranted, procedural obstacles Phelps has faced in his eleven-year-long attempt to have his constitutional challenges evaluated on their merits.

jurisdictional question, and that he therefore lacked standing. On this assumption, the panel dismissed the appeal without ever deciding either the certified or uncertified question. It opted not to exercise its own authority to expand the certificate of appealability, a procedure that would have obviated the procedural difficulty that the panel believed prevented it from resolving the question before it. Phelps petitioned for rehearing and for rehearing en banc, but both petitions were once again denied. *See Phelps v. Alameda*, No. 02-15821 (9th Cir. June 2, 2004) (order denying petitions for rehearing and rehearing en banc).

Eleven months after this second appeal became final, the United States Supreme Court held that a "Rule 60(b) motion [that] challenges only [a] District Court's previous ruling on the AEDPA statute of limitations . . . is not the equivalent of a successive *habeas* petition." *Gonzalez v. Crosby*, 545 U.S. 524, 535-36 (2005). The Court's opinion directly refuted the district court's holding in Phelps' case that it lacked jurisdiction to entertain his Rule 60(b) motion. In fact, the *Gonzalez* decision employs precisely the same language Phelps used when urging the court not to apply the successive-petition rule to his motion. In his brief to the district court, Phelps argued that only "Rule 60(b) motions raising new factual issues and new evidence and seeking to relitigate issues that had already been decided on the merits" should be barred by the successive-petition rule. This is precisely what the Supreme Court held. *See id.* at 531-34 (holding Rule 60(b) motion is not a successive *habeas* petition unless it "present[s] new claims for relief from a state court's judgment of conviction . . . . [or seeks to] present[ ] new evidence in support of a claim already litigated . . . . [or] seeks to revisit the federal court's denial *on the merits* of a claim for relief . . . ."). Thus, for the second time, Phelps had presented exactly the correct legal argument to the district court, but did so a few months too soon.

Following this second affirmation of his legal position, Phelps, now proceeding *pro se*, once again

asked the district court to reconsider its original dismissal of his *habeas* petition as untimely, a dismissal that by this point was predicated on two indisputably erroneous legal rulings. The district court, however, once again refused to reconsider its dismissal. In denying this second motion for reconsideration, the court simply stated that Phelps "failed to set forth any cognizable ground to warrant reconsideration of the Court's prior order." *Phelps v. Alameda*, No. 98-2002-MMC (N.D. Cal. Dec. 11, 2006) (order denying motion for reconsideration). The court offered no further explanation of its decision.

Following this third refusal by the district court to examine the merits of his timely filed *habeas* petition, Phelps sought yet another certificate of appealability from the district court, which was once again denied. He then sought a certificate of appealability from this court, which was initially denied. Undeterred, Phelps petitioned this court for reconsideration of that denial, which we granted. We issued a certificate of appealability with respect to the following question: "whether the inconsistent application of rules governing finality of California Supreme Court *habeas* decisions deprived appellant of a fundamental right and constitutes an extraordinary circumstance warranting relief pursuant to Federal Rule of Civil Procedure 60(b)(6)."

Over eleven years after Phelps filed his petition for *habeas corpus* in the district court, we now address this most recent question.

II.

Phelps' appeal from the denial of his Rule 60(b) motion presents three interrelated questions. First: following the original dismissal of his federal *habeas* petition as untimely, has there in fact been an intervening change in the law with respect to how summary denials of *habeas* petitions by the California Supreme Court are construed for purposes of calculating AEDPA's statute of limitations? Second: can a motion for reconsideration under Fed.

R. Civ. P. 60(b)(6) ever be predicated on an intervening change in the law? Third: if such a motion can be predicated on an intervening change in the law, how should such a request for reconsideration be analyzed? We address each of these questions in turn.

A.

As a preliminary matter, we must determine whether the law governing the timeliness of Phelps' *habeas* petition has indeed changed since the original judgment dismissing that petition became final. As indicated in the procedural history above, there is no doubt in our minds that the law has in fact changed, and that it has changed decisively in Phelps' favor. However, because the State's central argument on appeal is that Phelps' *habeas* petition remains untimely even under *currently* governing law, we will now address that contention.

As explained in detail above, Phelps initially filed his state petition for *habeas corpus* in the California Court of Appeal. Once that court denied his petition, he then sought review in the California Supreme Court via a petition for review. As we have previously explained, "there are two methods by which a petitioner may seek review by the California Supreme Court after a *habeas* petition is denied by the Court of Appeal. The preferred method is by a petition for review, but the petitioner is also free to file instead an original [*habeas*] petition in the California Supreme Court," invoking that court's original jurisdiction. *Saffold v. Newland*, 250 F.3d 1262, 1266 n.4 (9th Cir. 2000); *see supra* note 6. Phelps followed the "preferred method," and the California Supreme Court denied his petition for review on April 30, 1997. The district court construed that denial as an "order" under California Rule of Court 24(a) and therefore considered it final as of the date it was filed. As such, it considered Phelps' federal *habeas* petition, which was filed on May 15, 1998, to have been filed fifteen days past AEDPA's one-year statute of limitations.

[1] Fifteen months after the district court's dismissal became final, this court issued a published opinion holding that "Rule 24 of the California Rules of Court provides that . . . a denial of a *habeas* petition within the California Supreme Court's original jurisdiction *is not final for 30 days.*" *Bunney v. Mitchell*, 262 F.3d 973, 974 (9th Cir. 2001) (per curiam) (emphasis added). *Bunney* was quickly reaffirmed in multiple published opinions of this court, including one issued by the en banc court that directly stated, "Under *Bunney*, which we now reaffirm[,]" "the California Supreme Court's denial of a petition for collateral relief does not become final until thirty days after the denial is issued." *Allen v. Lewis*, 295 F.3d 1046 (9th Cir. 2002) (en banc); *see also Smith v. Duncan*, 297 F.3d 809, 814 (9th Cir. 2002) (following *Bunney*); *Corjasso v. Ayers*, 278 F.3d 874, 879 (9th Cir. 2002) (same).

While these cases would seem to resolve in Phelps' favor the question of whether his federal *habeas* petition was timely filed, the Attorney General seizes on the words "original jurisdiction" in *Bunney*'s holding to argue that *Bunney* did not change the law with respect to individuals like Phelps who followed the "preferred method" and filed a petition for *review* with the California Supreme Court instead of filing an *original habeas* petition, as happened to be the case in *Bunney*. The state's argument is devoid of merit for multiple reasons.

[2] First, no less an authority than the United States Supreme Court has made clear that, for purposes of AEDPA's statute of limitations, there is absolutely no functional or legal difference between the two forms of petitions filed in the California Supreme Court. The Court explicitly stated that "the original [habeas] writ in California . . . is *interchangeable* with the petition for hearing."[11] *Id.*

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[11] As we have observed, "a 'petition for hearing' before the California Supreme Court . . . is now called a 'petition for review.'" *Roman v. Estelle*, 917 F.2d 1505, 1506 (9th Cir. 1990). "The same principle[s] hold[ ] for California's 'petition for

(continued...)

Carey v. Saffold, 536 U.S. 214, 225 (2002) (emphasis added).

[3] Second, recognizing that there is no difference between the two petitions other than the word written on their cover pages, this court has directly applied the *Bunney* rule to petitions for review in precisely the same manner that it applies the rule to original *habeas* petitions. In *Biggs v. Duncan*, a case that also addressed AEDPA's statute of limitations, we said that "a petition for *review* [filed] with the California Supreme Court . . . became final 30 days [aft]er" its denial. 339 F.3d 1045, 1047 (9th Cir. 2003) (emphasis added); *see also Lott v. Mueller*, 304 F.3d 918, 922 (9th Cir. 2002) (same). The procedural history at issue in *Biggs* is directly analogous to the procedural history of Phelps' case. The State's argument is thus squarely foreclosed.

Finally, the third and most damning indication that the State's position is meritless is that the State explicitly argued *in this case* that there is no distinction between a petition for review and an original *habeas* petition filed with the California Supreme Court. In its initial pleadings before the district court requesting that Phelps' federal *habeas* petition be dismissed as untimely, the State wrote:

> When an inmate's petition for writ of *habeas corpus* in the [California] Court of Appeal has been denied, the inmate may either petition for review of that decision in the California Supreme Court, or file an original petition for *habeas corpus* in the California Supreme Court. *The two courses of action appear to differ in name only.*

Later, at oral argument before the district court, the State explicitly argued that there was no distinction between an original petition and a petition for review:

(...continued)
review' as for the earlier 'petition for rehearing.' " *Id.*

> A petitioner for writ of *habeas corpus* in the California Supreme Court may call his or her petition a petition for *habeas corpus*, or if a similar petition has been filed before the state Court of Appeal, it may be called a petition for review of the Court of Appeal *habeas corpus* petition. However, these *differ in name only*. To our understanding and the cases and practice of the court, they differ in name only. *The rules as to finality are not any different*. . . . The California Supreme Court treats them as *identical for all purposes*.

It was not until *Bunney* made clear that the central argument advanced by the State before the district court was incorrect that the State reversed course and advanced the position it now urges on appeal. Thus, even if this position were not clearly erroneous under circuit and Supreme Court precedent, the State is not free on appeal to rely on it as it is directly contrary to the argument that the State presented to the district court. *C.f., e.g., United Nat'l Ins. Co. v. Spectrum Worldwide, Inc.*, 555 F.3d 772, 778 (9th Cir. 2009) ("[J]udicial estoppel is an equitable doctrine [that] . . . . bars inconsistent positions taken in the same litigation . . . .").

[4] In sum, the rule established in *Bunney*, as applied in *Lott* and *Biggs*, indisputably applies to Phelps' case. The State conceded as much before the district court, and its original position is the only position supported by the law.

B.

As the discussion above makes clear, there can be no doubt that shortly after this court affirmed the dismissal of Phelps' *habeas* petition there was "a clear and authoritative change in the governing law." *Polites v. United States*, 364 U.S. 426, 432 (1960). Thus, had Phelps' petition been considered under the precedents as they existed shortly after his first appeal, there is no question that he would have

prevailed. The question we must now consider is what significance, if any, this intervening change in the law holds for Phelps' motion for reconsideration under Fed. R. Civ. P. 60(b)(6).[12] We review the district court's denial of the motion for an abuse of discretion. *Harvest v. Castro*, 531 F.3d 737, 741 (9th Cir. 2008). However, the district court necessarily abused its discretion if its denial "rested upon an erroneous view of the law." *Faile v. Upjohn Co.*, 988 F.2d 985, 986-87 (9th Cir. 1993).

In denying the motion currently under review, the district court simply stated that Phelps "failed to set forth any cognizable ground to warrant reconsideration of [its] prior order" of dismissal. *Phelps*, No. 98-2002-MMC (N.D. Cal. Dec. 11, 2006) (order denying motion for reconsideration). However, when denying Phelps' original Rule 60(b) motion, the court provided a more detailed rationale, stating that "a change in the applicable law after a judgment has become final is not a sufficient basis for vacating the judgment." *Phelps*, No. 98-2002-MMC, slip op. at 2 (N.D. Cal. Mar. 26, 2002) (order denying motion to reinstate) (quoting *Tomlin v. McDaniel*, 865 F.2d 209, 210 (9th Cir. 1989)). While that first motion was

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[12] Federal Rule of Civil Procedure 60(b) states as follows:

> [T]he court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

dismissed, incorrectly, for lack of jurisdiction, the district court presumably relied on the same logic in the denial order currently under review. Accordingly, we construe its denial of the second motion for reconsideration as predicated on the same rationale articulated in its denial of the first motion: specifically, that a Rule 60(b)(6) motion can *never* be granted if it is based on an intervening change in the law.

In applying this *per se* rule to deny Phelps' motion, the district court quoted directly from this court's opinion in *Tomlin v. McDaniel*, 865 F.2d 209, 210 (9th Cir. 1989). *Tomlin* affirmed the denial of a Rule 60(b)(6) motion because "the judgment [at issue] . . . became final *before* the laws changed." *Id.* at 211. The court further stated that the fact that Tomlin's motion was predicated on an intervening change in the law was "the rock on which [his] arguments founder[ed]." *Id.* at 211. Thus, if *Tomlin*'s *per se* approach remained good law, the district court's denial of Phelps' motion for reconsideration was compelled by precedent and cannot have been an abuse of discretion.

The *Tomlin per se* rule that Rule 60(b)(6) motions cannot be predicated on intervening changes in the law was, however, no longer good law. The Supreme Court directly refuted the *Tomlin* rule in a case bearing a striking resemblance to the case before us: *Gonzalez v. Crosby*, 545 U.S. 524 (2005).[13] In *Gonzalez*, an inmate in state prison filed a petition

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[13] *Gonzalez* was not the first indication from the Supreme Court that Rule 60(b)(6) is not governed by a *per se* approach such as that set forth in *Tomlin*. *See Agostini v. Felton*, 521 U.S. 203, 239 (1997); *Polites*, 364 U.S. at 432. Indeed, discussing precedents predating *Gonzalez*, we have previously observed that "the Supreme Court suggested" at an early point in its case law on this subject "that . . . it might be *wrong* to inflexibly withhold relief under Rule 60(b) 'when there has been a clear and authoritative change in the governing law.' " *Clifton v. Attorney Gen. of Cal.*, 997 F.2d 660, 664 n.5 (9th Cir. 1993) (emphasis added) (quoting *Polites*, 364 U.S. at 432).

for federal *habeas* relief that was denied by the federal district and appellate courts as untimely under AEDPA's statute of limitations. *Id.* at 527. Seven months later, the Supreme Court issued a decision that reversed the rule relied upon by the court of appeals. Had the Supreme Court's new rule been applied in Gonzalez's case, it would have rendered his *habeas* petition timely. *Id.* In light of this change in the law, Gonzalez, like Phelps, filed a Rule 60(b)(6) motion seeking to reopen his case. *Id.* The Supreme Court's central holding in *Gonzalez* was that a Rule 60(b)(6) motion is the *proper* means of bringing such a challenge and that such a motion should not be construed as a second or successive habeas petition subject to the strict restrictions of 28 U.S.C. § 2244(b)(3)(A).[14] *Id.* at 533.

[5] However, most relevant to the present issue before us, the Court then went on to decide the merits of Gonzalez's Rule 60(b) motion. In so doing, it did *not* hold that denial of the motion was required because it rested on a subsequent change in the law. Rather, the Court emphasized two specific factors to demonstrate that Gonzalez's case did not exhibit the "extraordinary circumstances" required to grant Rule 60(b)(6) relief. The Court specifically held that, because of these two factors, which we discuss in detail in the next section of our analysis, "[t]he change in the law" was an insufficient ground for relief under Rule 60(b)(6) "in petitioner's case." *Id.* (emphasis added).

[6] That the Court applied a case-by-case approach rather than a *per se* rule is made all the more clear by its favorable citation to the Eleventh Circuit's opinion in *Ritter v. Smith*, 811 F.2d 1398, 1400 (11th Cir. 1987). Noting that "*Ritter* [was] cited favorably by the Supreme Court in *Gonzalez*," we have previously stated that *Ritter* "is instructive" for courts applying Rule 60(b)(6) to *habeas corpus*.

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[14] It is this holding that directly overruled the district court's initial denial of Phelps' first Rule 60(b) motion for lack of jurisdiction.

Harvest, 531 F.3d at 748 n.8. In *Ritter*, the Eleventh Circuit squarely addressed the argument that "a supervening change in the law can never present a sufficient basis for Rule 60(b)(6) relief." 811 F.2d at 1401. The court, however, reached "the opposite conclusion" and held that precedents from its own and other circuits "plainly allow Rule 60(b)(6) relief where there has been a clear-cut change in the law." *Id.* (citing *Wilson v. Fenton*, 684 F.2d 249, 251 (3d Cir. 1982); *Fackelman v. Bell*, 564 F.2d 734. 736 (5th Cir. 1977)). The court made clear that "a change in the law will not *always* provide the truly extraordinary circumstances necessary to reopen a case." *Id.* Rather, it "conclude[d] that something more than a 'mere' change in the law is necessary." *Id.* Accordingly, it examined "several factors in th[e] case in addition to the fact of the change in the law" in reaching its conclusion "that the circumstances . . . warrant[ed] relief under Rule 60(b)."[15] *Id.*

[7] The Supreme Court's favorable citation to *Ritter* as an "instance[ ]" in which "Rule 60(b) ha[d] an unquestionably valid role to play in [a] *habeas* case[ ]," when combined with the Court's own analysis of the Rule 60(b) motion at issue in *Gonzalez*, indicates that the proper course when analyzing a Rule 60(b)(6) motion predicated on an intervening change in the law is to evaluate the circumstances surrounding the specific motion before the court. As the Sixth Circuit rightly held when applying *Gonzalez*, "the decision to grant Rule 60(b)(6) relief is a case-by-case inquiry that requires the trial court to intensively balance numerous factors, including the competing policies of the finality of judgments and the incessant command of the court's conscience that justice be done in light of all the facts." *Stokes v. Williams*, 475 F.3d 732, 736 (6th Cir. 2007) (internal quotation marks omitted). It is this "case-by-case inquiry," and not the *per se* rule

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[15] These factors, along with the *Gonzalez* factors, are discussed in more detail in the following section.

of *Tomlin*, that should govern Rule 60(b)(6) in *Gonzalez*'s wake.

[8] When a decision from the Supreme Court has "undercut the theory or reasoning underlying [a] prior circuit precedent in such a way that the cases are clearly irreconcilable, ... a three-judge panel of this court and district courts should consider themselves bound by the intervening higher authority and reject the prior opinion of this court as having been effectively overruled." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc); *see also id.* (noting that "lower courts [are] bound not only by the holdings of higher courts' decisions but also by their 'mode of analysis' "). Because *Gonzalez* and *Tomlin* are clearly irreconcilable in their analytical approaches to Rule 60(b)(6), we hold that *Tomlin*'s *per se* approach has been overruled by intervening Supreme Court precedent. We agree that a "case by case inquiry" is required. In so holding, we harmonize our circuit's law with the law of nine of the eleven other circuits that have addressed this issue.[16] Only the Fourth and Tenth Circuits still adhere to a *per se* rule that changes in the law can never support a Rule 60(b)(6) motion. However, the relevant precedents in those circuits antedate *Gonzalez* by over a decade, and neither circuit appears to have revisited the issue since *Gonzalez* was decided.[17]

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[16] *See GenCorp, Inc. v. Olin Corp.*, 477 F.3d 368, 373 (6th Cir. 2007); *United States ex rel. Garibaldi v. Orleans Parish Sch. Bd.*, 397 F.3d 334, 335 (5th Cir. 2005); *Pichardo v. Ashcroft*, 374 F.3d 46, 56 (2d Cir. 2004); *Morris v. Horn*, 187 F.3d 333, 341-43 (3d Cir. 1999); *Kansas Pub. Empls. Retirement Sys. v. Reimer & Koger Assocs.*, 194 F.3d 922, 925 (8th Cir. 1999); *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv.*, 131 F.3d 625, 628 (7th Cir. 1997); *Booker v. Singletary*, 90 F.3d 440, 442 (11th Cir. 1996); *W.L. Gore & Assoc. v. C.R. Bard, Inc., 977 F.2d 558, 562 (Fed. Cir. 1992); see also O'Callaghan v. Shirazi*, 204 Fed. App'x 35, 36 (1st Cir. 2006) (per curiam).

[17] *See Dowell v. State Farm Fire & Casualty Auto. Ins. Co.*, 993 F.2d 46 (4th Cir. 1993); *Van Skiver v. United States*, 952 F.2d 1241, 1245 (10th Cir. 1991).

(continued...)

[9] In sum, *Tomlin*'s *per se* approach to Rule 60(b) is no longer good law.[18] The district court's *per*

(...continued)

The Federal Circuit has also expressed explicit preference for the minority's per se rule, but did so in an opinion that, in addition to antedating *Gonzalez*, is unpublished and contradicts a published Federal Circuit precedent. *Compare Concept Design Elecs. & Mfg. v. Duplitronics, Inc.*, No. 96-1065, 1996 U.S. App. LEXIS 33145, at *11 (Fed. Cir. Dec. 19, 1996) (adopting the minority rule set forth in *Dowell* over the majority rule of *Ritter*), *with W.L. Gore & Assoc.*, 977 F.2d at 562 ("[A]n intervening change in law is a factor to be weighed, along with other aspects of the particular case, against the public and private interest in finality of judgments.").

The Court of Appeals for the District of Columbia Circuit does not appear to have squarely addressed post-*Gonzalez* whether a Rule 60(b)(6) motion predicated on an intervening change in the law can ever be granted. In a decision predating *Gonzalez*, the court appeared to endorse the *per se* approach. *See Delta Foods Ltd. v. Republic of Ghana*, 265 F.3d 1068, 1071 (D.C. Cir. 2001) (quoting *Polites*, 364 U.S. at 431). *Contra Polites*, 364 U.S. at 433. Following *Gonzalez*, it suggested in passing and in *dicta* "that 'extraordinary circumstances' are not present when . . . there has been an intervening change in case law." *Kramer v. Gates*, 481 F.3d 788, 792 (D.C. Cir. 2007). However, because that opinion cites *Agostini* and *Gonzalez* as examples of the asserted proposition, *see id.*, it seems unlikely that the court intended to endorse a *per se* rule, given *Gonzalez*'s clear use of a case-by-case approach.

[18] In a brief footnote in a case that post-dated *Gonzalez*, we affirmed the denial of a Rule 60(b) motion on the ground that it relied on a change in decisional law, citing *Tomlin*. *See Delay v. Gordon*, 475 F.3d 1039, 1046 n.13 (9th Cir. 2007) (citing *Tomlin*, 865 F.2d at 210). Because the footnote did not cite or even mention *Gonzalez*, we cannot assume that we intended to come to any conclusion as to the effect of *Gonzalez* on *Tomlin*. Now, having considered *Gonzalez*'s effect, we conclude, as explained above, that it overrules *Tomlin*, at least with respect to the latter's *per se* rule. *Cf. Rotec Indus., Inc. v. Mitsubishi Corp.*, 348 F.3d 1116, 1121 (9th Cir. 2003).

se rejection of Phelps' motion for reconsideration, which relied directly and exclusively on *Tomlin*, therefore "rested upon an erroneous view of the law." *Faile*, 988 F.2d at 986-87. Accordingly, "the district court abused its discretion." *Id.*

C.

Having concluded that the district court's rationale for rejecting Phelps' motion for reconsideration was erroneous, we now address the final issue presented by this appeal: What analysis should courts employ when evaluating the merits of a motion for reconsideration such as the one presented in this case? Ordinarily, this analysis will be conducted by district courts in the course of reviewing Rule 60(b)(6) motions in the first instance. However, as the Supreme Court held in *Gonzalez*, 545 U.S. at 536-38, appellate courts may, in their discretion, decide the merits of a Rule 60(b) motion in the first instance on appeal. *But cf. id.* at 540 (Stevens, J., dissenting). Here, because all of the facts relevant to our analysis are fully set forth in the record, and because this appeal presents unusual circumstances — specifically, that Phelps has already suffered extremely prolonged delay in the consideration of his federal *habeas* petition and the district court has already had three opportunities to rule on Phelps' motion for reconsideration — we exercise that discretion and decide the merits of Phelps' Rule 60(b)(6) motion on this appeal.

[10] As stated above, courts applying Rule 60(b)(6) to petitions for *habeas corpus* have considered a number of factors in deciding whether a prior judgment should be set aside or altered. Most notably, the Supreme Court in *Gonzalez* and the Eleventh Circuit in *Ritter*, laid out specific factors that should guide courts in the exercise of their Rule 60(b)(6) discretion. In discussing these factors, we do not suggest that they impose a rigid or exhaustive checklist: "Rule 60(b)(6) is a grand reservoir of equitable power," *Harrell v. DCS Equip. Leasing Corp.*, 951 F.2d 1453, 1458 (5th Cir. 1992) (internal

footnote and quotation marks omitted), and it affords courts the discretion and power "to vacate judgments whenever such action is appropriate to accomplish justice." *Gonzalez*, 545 U.S. at 542 (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988)). However, we have "cautioned against the use of provisions of Rule 60(b) to circumvent the strong public interest in [the] timeliness and finality" of judgments. *Flores v. Arizona*, 516 F.3d 1140, 1163 (9th Cir. 2008). Given these important and potentially countervailing considerations, the exercise of a court's ample equitable power under Rule 60(b)(6) to reconsider its judgment "requires a showing of 'extraordinary circumstances.' " *Gonzalez*, 545 U.S. at 536. The factors we discuss below are designed to guide courts in determining whether such extraordinary circumstances have been demonstrated by an individual seeking relief under the rule.[19]

[11] Our analysis must begin with the Supreme Court's decision in *Gonzalez*, a case that is both strikingly similar and dissimilar to the case before us. As described above, the posture of *Gonzalez* is almost identical to the posture of this case: a federal *habeas* petition was dismissed as untimely under AEDPA in a decision that was soon overruled in a more authoritative opinion; the petitioner then sought reconsideration of that dismissal by filing a motion for reconsideration under Rule 60(b)(6). In evaluating the merits of that motion, which it ultimately denied, the Supreme Court emphasized two specific factors that we must consider in this case as well. First, the Court emphasized that, in Gonzalez's case, "[t]he District Court's [initial]

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[19] The factors we describe are particularly useful in applying Rule 60(b)(6) to rejected petitions for *habeas corpus*. We note, however, that Rule 60(b) applies broadly to all federal civil actions; while some of the factors we emphasize here may be useful in contexts other than the one before us, we express no opinion on their applicability *vel non* beyond the scope of *habeas corpus*.

interpretation was by all appearances *correct* under the Eleventh Circuit's then-*prevailing* interpretation of [AEDPA's statute of limitations]." *Gonzalez*, 545 U.S. at 536 (emphases added). In other words, the intervening change in the law in *Gonzalez* overruled an otherwise settled legal precedent. Second, the Court stressed that "[t]he change in the law [was] all the less extraordinary in [Gonzalez's] case, because of his lack of diligence in pursuing review of the statute-of-limitations issue." *Id.* at 537. The Court noted that Gonzalez "neither raised that issue in his application for a COA, nor filed a petition for rehearing of the Eleventh Circuit's denial of a COA, nor sought certioari review." *Id.*

[12] Given the strong similarity between the posture of this case and *Gonzalez*, we must give significant consideration to the two *Gonzalez* factors in evaluating Phelps' motion. However, the strong *dissimilarity* between Phelps and Gonzalez with respect to those two factors means that the factors necessarily cut in Phelps' favor. Specifically, unlike in *Gonzalez*, the change in the law worked in this case by *Bunney v. Mitchell* did not upset or overturn a settled legal principle. To the contrary, at the same time that Phelps' original appeal was pending before a panel of this court, the exact same issue was pending before two other Ninth Circuit panels considering other appeals. As described earlier, those panels reached diametrically opposite outcomes from that reached by the panel reviewing Phelps' case. Moreover, none of these dispositions was published and as such they were nonprecedential. *See Reynolds Metals Co. v. Ellis*, 202 F.3d 1246, 1249 (9th Cir. 2000) ("[A]n unpublished memorandum disposition . . . is not binding precedent."). Accordingly, none of these dispositions was capable of establishing, to use the Supreme Court's words, a "prevailing interpretation of 28 U.S.C. § 2244(d)(2)" as it relates to summary denials from the California Supreme Court. *Gonzalez*, 545 U.S. at 536. Furthermore, even if memorandum dispositions were capable of demonstrating the "then-prevailing" law for purposes of this inquiry, *cf. Prison Legal News v. Lehman*, 397

F.3d 692, 701-02 (9th Cir. 2005), the discord exemplified by the contradictory memorandum dispositions here demonstrates that the law in our circuit was decidedly *un*settled at the time Phelps' *habeas* petition was before the district court. The law regarding the core disputed issue in Phelps' case did not become settled until fifteen months after his appeal became final, at which point it was clear from *Bunney* that the "prevailing interpretation of 28 U.S.C. § 2244(d)(2)" was the interpretation he had pressed all along. Accordingly, whereas the first *Gonzalez* factor cut against granting Rule 60(b)(6) relief in that case, it necessarily cuts in favor of granting such relief here.

Similarly, the sharp divergence between Phelps and Gonzalez with respect to the second *Gonzalez* factor — the petitioner's exercise of diligence in pursuing the statute-of-limitations issue — demonstrates that this factor also cuts strongly in Phelps' favor. Whereas Gonzalez "neither raised that issue in his application for a COA, nor filed a petition for rehearing of the Eleventh Circuit's denial of a COA, nor sought certiorari review of that denial," *Gonzalez*, 545 U.S. at 537, Phelps has demonstrated more diligence than we could ever reasonably demand from a *habeas* petitioner. When Phelps' *habeas* petition was first dismissed as untimely, he sought and received a certificate of appealability and pressed on appeal the very argument later embraced by *Bunney*. When the dismissal of his *habeas* petition was affirmed, he filed a petition for rehearing and a petition for rehearing en banc. The latter was rejected despite the clear incongruity between almost simultaneously issued memorandum dispositions.[20]

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[20] Phelps' petition for rehearing en banc was denied four days after the panel authoring one of the contradictory memorandum dispositions issued its holding. *Compare Phelps v. Alameda*, No. 99-15493 (9th Cir. May 8, 2000) (order denying petition for rehearing and petition for rehearing en banc), *with Washington v. Lindsey*, No. 99-55149, 2000 U.S. App. LEXIS 9015, at *4 (9th Cir. May 4, 2000). Our en banc court endorsed

(continued...)

Following the rejection of his petitions for rehearing, Phelps filed a petition for certiorari. After that was denied, he filed his first Rule 60(b)(6) motion for reconsideration a mere four months after Bunney became final and vindicated his original position. When the district court denied him a certificate of appealability from the denial of that motion he dutifully sought and obtained a certificate from this court. When his second appeal was dismissed, Phelps again petitioned this court for rehearing and rehearing en banc. Once Phelps was vindicated by the Supreme Court's decision in Gonzalez, he filed another motion for reconsideration. Despite the fact that he had to prepare this second motion *pro se* from his prison cell, he filed it ten months after *Gonzalez* was issued. The *pro se* motion and its supporting legal memorandum set forth clear, wellreasoned, and indeed *correct* legal arguments that were supported by all of the appropriate citations to case law. When that motion was denied, Phelps again sought a certificate of appealability from the district court. When that was denied, he sought a certificate from this court, and when *that* was denied he petitioned for reconsideration, which we granted, affording him the opportunity to argue his current appeal.

[13] We cannot imagine a more sterling example of diligence than Phelps has exhibited. At every stage of this case over the past decade, Phelps has pressed all possible avenues of relief, has been remarkably undeterred by the repeated and often unjustified setbacks he has suffered, and has put forward cogent, compelling, and correct legal arguments, at times doing so without the benefit of professional legal advice. No one should have to work so hard to have the merits of his constitutional claims reviewed by a federal judge. That Phelps did so weighs strongly in his favor under the second *Gonzalez* factor.

(...continued)
the *Bunney* rule shortly after *Bunney* was decided. *See Allen*, 295 F.3d 1046.

[14] In addition to the two factors relied upon by the Supreme Court in *Gonzalez*, which weigh heavily in *Phelps*' favor, we believe that the factors relied upon by the Eleventh Circuit in *Ritter v. Smith* also provide useful guidance for courts applying Rule 60(b)(6) to petitions for *habeas corpus*. As we have previously stated, *Ritter* is an "instructive" precedent "cited favorably by the Supreme Court," *Harvest*, 531 F.3d at 748 n.8, as an example of a *habeas* case in which "Rule 60(b) ha[d] an unquestionably valid role to play," *Gonzalez*, 545 U.S. at 534. Indeed, *Ritter* presents the most thorough analysis thus far of Rule 60(b)(6) as applied to *habeas* petitions. In evaluating the motion for reconsideration before it, the Eleventh Circuit concluded that four "factors in th[at] case, in addition to the fact of the change in the law, persuade[d it] that the circumstances [at issue were] sufficiently extraordinary to warrant relief." *Ritter*, 811 F.2d at 1401. We discuss each of those factors in relation to Phelps' case.

The first factor articulated in *Ritter* is whether granting the motion to reconsider would "undo the past, executed effects of the judgment," thereby disturbing the parties' reliance interest in the finality of the case. 811 F.2d at 1402. As an example of a party's reliance interest in the finality of a judgment, the court noted that when a judgment conveys land from one party to another and the prevailing party "enter[s] upon the land and install[s] pipes and appurtenances," the judgment should not be overturned even if it is predicated on a later-overruled legal precedent because the prevailing party has relied on his legal right to the land. *Id.* at 1401 (citing *Collins v. City of Wichita*, 254 F.2d 837 (10th Cir. 1958)). Similarly, the court noted that when a judgment affords a federal *habeas* petitioner a new trial that results in the eventual dismissal of the charges and his release from custody, the judgment should not be disturbed and the petitioner's freedom revoked years later due to intervening precedents because doing so would significantly alter his legal status as a free man. *See id.* at 1402 (citing *Hall v. Warden*, 364 F.2d 495 (4th

Cir. 1966)). The underlying principle embodied by these examples is that Rule 60(b)(6) relief is less warranted when the final judgment being challenged has caused one or more of the parties to change his legal position in reliance on that judgment.

In Phelps' case, however, neither party has relied in such a fashion on the finality of the district court's dismissal. Neither the State nor Phelps have undergone any change in legal position over the past eleven years due to the district court's judgment. To the contrary, when Phelps' petition was dismissed, his federal case simply ended: Phelps remained in prison, and the State stopped defending his imprisonment. There are no "past effects" of the judgment that would be disturbed if the case were reopened for consideration of the merits of Phelps' *habeas* petition. Instead, the parties would simply pick up where they left off. Accordingly, the first *Ritter* factor weighs heavily in Phelps' favor.

The second factor relied upon by the court in *Ritter* examines the "delay between the finality of the judgment and the motion for Rule 60(b)(6) relief." *Id.* This factor represents the simple principle that a change in the law should not indefinitely render preexisting judgments subject to potential challenge. Rather, individuals seeking to have a new legal rule applied to their otherwise final case should petition the court for reconsideration with a degree of promptness that respects "the strong public interest in timeliness and finality." *Flores*, 516 F.3d at 1163. In this respect, the second *Ritter* factor is similar, although not identical, to the second *Gonzalez* factor, which emphasizes the petitioner's diligence in challenging on appeal the judgment he now seeks to overturn.

In evaluating this second factor, the Eleventh Circuit described a motion for reconsideration that was filed nine months after the original judgment became final as representing "only a very brief delay." *Ritter*, 811 F.2d at 1402; *see also id.* at 1400. In Phelps' case, his original motion for

reconsideration was filed only *four* months after the judgment dismissing his petition became final.[21] Thus, much like the *Gonzalez* factor emphasizing diligence, *Ritter*'s emphasis on delay weighs strongly in Phelps' favor.

The "third factor supporting a finding of extraordinary circumstances" in *Ritter* was "the close relationship between the two cases at issue" — the decision embodying the original judgment and the subsequent decision embodying the change in the law. *Id.* at 1402. Much like the first *Gonzalez* factor, which focuses on the extent to which the law was settled prior to the intervening change, this factor is designed to recognize that the law is regularly evolving. The foundation of the American judicial system that sets it apart from many regimes across the world is its common law heritage, which is immanent in judicial interpretations of legal texts ranging from statutes to judicial opinions to the Constitution itself.[22] Given this tradition, legal rules

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[21] Phelps' second motion for reconsideration was of course filed almost six years after his original dismissal became final. However, this is so only because his first motion for reconsideration was *incorrectly* dismissed as a successive *habeas* petition — an error that Phelps promptly sought to correct after *Gonzalez* overruled that erroneous dismissal. Given these circumstances, we treat the two motions as inextricably intertwined, and in examining the second *Ritter* factor we consider the length of time between when the original judgment dismissing Phelps' *habeas* petition became final after appeal, *see* Fed. R. App. P. 41, and the time at which he filed his first motion for reconsideration. To do otherwise would penalize Phelps simply for not appending the word "renewed" to his second, pro se motion for reconsideration and would thereby employ the same excessive formalism that has already frustrated the pursuit of justice throughout the long decade this case has been pending.

[22] *See, e.g.*, Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1 (1998); David A. Strauss, (continued...)

and principles inevitably shift and evolve over time, but the mere fact that they do so cannot upset all final judgments that have predated any specific change in the law. Rather, the *nature* of that change is important. Accordingly, the third *Ritter* factor directs courts to examine closely the original and intervening decisions at issue in a particular motion for reconsideration predicated on an intervening change in the law: if there is "a close connection between the two cases, the court [will be more likely to] f[i]nd the circumstances sufficiently extraordinary to justify disturbing the finality of the [original] judgment." *Id.*

In both Phelps' case and in *Ritter*, *see id.*, the intervening change in the law directly overruled the decision for which reconsideration was sought. Furthermore, in both cases, the intervening precedent "resolved a conflict between" competing and coequal legal authorities. *Id.* In *Ritter*, the intervening Supreme Court precedent resolved a split between the Eleventh Circuit and the Alabama Supreme Court, *id.*; in Phelps' case, the intervening precedent resolved a conflict between multiple Ninth Circuit panels that had issued contemporaneous but contradictory memorandum dispositions. The Eleventh Circuit considered both the direct relationship between the original and intervening decisions and the fact that the latter decision definitively resolved a preexisting conflict in the law as weighing in favor of granting relief under Rule 60(b)(6). The same is true in Phelps' case and the third *Ritter* factor accordingly weighs in favor of granting his motion here.

Finally, the court in *Ritter* also observed that, in applying Rule 60(b)(6) to cases involving petitions for

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(...continued)
Common Law Constitutional Interpretation, 63 U. CHI. L. REV. 877 (1996). *But see* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION (1998).

habeas corpus, judges must bear in mind that "[a] federal court's grant of a writ of *habeas corpus* . . . is always a serious matter implicating considerations of comity." *Id.* at 1403. To be sure, the need for comity between the independently sovereign state and federal judiciaries is an important consideration, as is the duty of federal courts to ensure that federal rights are fully protected. However, in the context of Rule 60(b)(6), we need not be concerned about upsetting the comity principle when a petitioner seeks reconsideration not of a judgment on the *merits* of his *habeas* petition, but rather of an *erroneous* judgment that prevented the court from ever *reaching* the merits of that petition. The delicate principles of comity governing the interaction between coordinate sovereign judicial systems do not require federal courts to abdicate their role as vigilant protectors of federal rights. To the contrary, as the Supreme Court has made clear, "in enacting [the *habeas* statute], Congress sought to 'interpose the federal courts between the States and the people, as guardians of the people's federal rights — to protect the people from unconstitutional action.' " *Reed v. Ross*, 468 U.S. 1, 10 (1984) (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972)). Even after the enactment of AEDPA, "[t]he writ of *habeas corpus* plays a vital role in protecting constitutional rights." *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). For that reason, the Supreme Court has emphasized that "[d]ismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) (emphasis added). Accordingly, in applying Rule 60(b) to *habeas corpus* petitions, the Fifth Circuit has persuasively held that

> [t]he "main application" of Rule 60(b) "is to those cases in which the true merits of a case might never be considered." Thus, although we rarely reverse a district court's exercise of discretion to deny a Rule

> 60(b) motion, we have reversed "where denial of relief precludes examination of the full merits of the cause," explaining that in such instances "even a slight abuse may justify reversal."

Ruiz v. Quarterman, 504 F.3d 523, 532 (5th Cir. 2007) (quoting *Fackelman v. Bell*, 564 F.2d 734, 735 (5th Cir. 1977); *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981)). We too believe that a central purpose of Rule 60(b) is to correct erroneous legal judgments that, if left uncorrected, would prevent the true merits of a petitioner's constitutional claims from ever being heard. In such instances, including the case presently before us, this factor will cut in favor of granting Rule 60(b)(6) relief.

[15] Having carefully evaluated the factors set forth in *Gonzalez* and in *Ritter* in the context of this case, we conclude that Phelps' motion for reconsideration demonstrates the extraordinary circumstances necessary to grant relief under Rule 60(b)(6). We emphasize once again that the factors we have discussed do not present an exhaustive or mechanical list of considerations. They do, however, represent well-reasoned principles that should guide courts in exercising their discretion under Rule 60(b)(6). In this case, the lack of clarity in the law at the time of the district court's original decision, the diligence Phelps has exhibited in seeking review of his original claim, the lack of reliance by either party on the finality of the original judgment, the short amount of time between the original judgment becoming final and the initial motion to reconsider, the close relationship between the underlying decision and the now controlling precedent that resolved the preexisting conflict in the law, and the fact that Phelps does not challenge a judgment on the merits of his *habeas* petition but rather a judgment that has prevented review of those merits all weigh strongly in favor of granting Rule 60(b)(6) relief. Accordingly, we reverse the denial of Phelps' motion and grant his request for relief from the judgment

dismissing his *habeas* petition as untimely. On remand, the district court shall evaluate the merits of the timely filed *habeas* petition that Phelps presented over eleven years ago.[23]

III.

It has sometimes been said that the law is a study of "those wise restraints that make men free." Much of law consists of necessary rules that give order and structure to a free society. Some rules promote order by emphasizing the need for efficiency, including the need for efficient management of the judicial system. Other rules are employed in the service of protecting individuals' fundamental rights and are designed to ensure that such individuals receive the Due Process they are guaranteed by our Constitution. *See* U.S. CONST. amends. V, XIV. Yet far too often in recent years, concern for efficiency and procedure has overshadowed concern for basic fairness, and has transformed our fidelity to "process" into an undue obsession with formalism and technicalities. In short, a concern for procedure has far too often obscured or eclipsed the equally important if not greater role to be played by our dedication to justice. It was, after all, in order "to establish justice" that our Constitution was written. *Id.* pmbl.

Phelps' case represents the epitome of our obsession with form over substance. For over eleven years, Phelps has sat in prison while he and his attorneys have struggled to have his claim that he is being imprisoned in violation of the Constitution evaluated on its merits. Phelps has traveled up and down the federal judiciary's apparatus three separate

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[23] The law of the case establishes that "Phelps . . . has exhausted all relevant state remedies." *Phelps*, 366 F.2d at 724. Thus, our holding that, according to the rule set forth in *Bunney* and its progeny, the petition is to be treated as timely filed removes the final procedural hurdle that remains between Phelps and a substantive review of his constitutional claims.

times. In so doing, he has produced nearly four hundred pages of legal briefs, motions, and petitions. His arguments have been evaluated by no less than twelve federal judges and nine Supreme Court Justices — not including his petitions for rehearing en banc which were reviewed by every judge of this court.

Yet, in all this time, not a single federal judge has once examined the substance of Phelps' claims. All of this energy — and, more important to Phelps, all of this *time* — has been spent evaluating one procedural question after another: Was the initial petition filed fifteen days early or fifteen days late? The answer, we learned, was early. Should the request for reconsideration have been called a "motion" or a "petition"? As it turns out, it does not matter. Did the order dismissing that motion contain a holding mixed with *dicta* or two alternative holdings? A fruitless diversion. Should the most recent motion have been rejected *per se* or reviewed under a case-by-case approach? It should have been reviewed in the context of the case at hand. To be sure, each of these questions raises legitimate legal issues. However, in wading through this endless morass of procedural questions, and frequently answering them incorrectly, a crucially important point has been repeatedly overlooked: Over eleven years ago, a man came to federal court and told a federal judge that he was being unlawfully imprisoned in violation of the rights guaranteed to him by the Constitution of the United States. More than eleven years later, not a single federal judge has ever once been allowed to seek to discover whether that claim is true.

The United States Supreme Court has made clear that the equitable power embodied in Rule 60(b) is the power "to vacate judgments whenever such action is appropriate to accomplish *justice*."[24] Given

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[24] *Gonzalez*, 545 U.S. at 542 (emphasis added) (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988)).

that directive, we agree that "the decision to grant Rule 60(b)(6) relief" must be measured by "the incessant command of the court's conscience that justice be done in light of all the facts."[25] With that guiding principle in mind, we **REVERSE** the denial of Phelps' motion for reconsideration and **REMAND** to the district court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

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[25] *Stokes*, 475 F.3d at 736 (6th Cir. 2007) (internal quotation marks omitted).

Filed July 31, 2009
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEVIN PHELPS,

Petitioner - Appellant,

v.

EDWARD ALAMEIDA,

Respondent - Appellee.

No. 07-15167
D.C. No. CV-98-02002-MMC
Northern District of California, San Francisco

ORDER

Before: BRIGHT,* REINHARDT and TASHIMA, Circuit Judges.

Judge Reinhardt has voted to deny the petition for rehearing en banc, and Judge Bright and Judge Tashima have so recommended. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is denied.

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* The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

Filed September 4, 2007
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEVIN PHELPS,

Petitioner - Appellant,

v.

EDWARD ALAMEIDA,

Respondent - Appellee.

No. 07-15167
D.C. No. CV-98-02002-MMC
Northern District of California, San Francisco

Before: REINHARDT and WARDLAW, Circuit Judges.

Appellant's petition for rehearing, filed in this court on July 17, 2007, is construed as a motion for reconsideration of this court's denial of a certificate of appealability. So construed, the motion is granted.

The request for a certificate of appealability is granted with respect to the following issue: whether the inconsistent application of rules governing the finality of California Supreme Court habeas decisions deprived appellant of a fundamental right and constitutes an extraordinary circumstance warranting relief pursuant to Federal Rule of Civil Procedure 60(b)(6). *See* 28 U.S. C. § 2253(c)(3); *see* also 9th Cir. R. 22-1(e).

Appellant's motion for in forma pauperis status is granted. The Clerk shall change the docket to reflect appellant's in forma pauperis status.

Counsel is hereby appointed to represent appellant for the remainder of this appeal. Counsel will be appointed by separate order.

The Clerk shall serve a copy of this order to Barry Portman, Federal Public Defender, 450 Golden gate Avenue, P.O. Box 36106, San Francisco, California 94102, who will locate appointed counsel. The district court shall provide the Clerk of this court with the name and address of appointed counsel by facsimile transmission (FAX: (415) 355-8811) within 14 days of locating counsel. If appellant does not wish to have appointed counsel, appellant shall file a motion asking to proceed pro se within 21 days of the date of this order.

Appointed counsel shall file an opening brief on November 14, 2007; appellee's answering brief is due December 14, 2007; the optional reply brief is due within days after service of the answering brief.

Filed June 29, 2007
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEVIN PHELPS,

Petitioner - Appellant,

v.

EDWARD ALAMEIDA,

Respondent - Appellee.

No. 07-15167
D.C. No. CV-98-02002-MMC
Northern District of California, San Francisco

Before: RYMER and GRABER, Circuit Judges.

The request for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c)(2). All outstanding motions are denied.

Filed December 11, 2006
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

KEVIN PHELPS,

Petitioner,

v.

EDWARD ALAMEIDA,

Respondent.

No. C 98-2002 MMC (PR)

ORDER DENYING MOTION FOR RECONSIDERATION

(Docket Nos. 47-48)

The Court is in receipt of a "Notice of Motion and Motion Pursuant to FRCP 60(b)(6) to Reconsider and Vacate Previous Order Denying First Motion Made Pursuant to FRCP 60(b)(5)," filed November 17, 2006 by petitioner, a California prisoner proceeding pro se. The instant motion repeats the arguments and allegations made in a previous motion filed by petitioner, which motion, as the Court found in its "Order Striking Motion" filed June 7, 2006, failed "to set forth any cognizable ground to warrant reconsideration of the Court's prior order."

Accordingly, the motion for reconsideration filed November 17, 2006 is hereby DENIED.

This order terminates Docket Nos. 47 and 48.

IT IS SO ORDERED.

Dated: Dec. 11, 2006

/s/

MAXINE M. CHESNEY
United States District Judge

Kevin L. Phelps
CDCR #J-46249
Folsom State Prison
P.O. Box 950
Folsom, CA 95763

In Pro Se

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KEVIN PHELPS,

Petitioner,

v.

EDWARD ALAMEIDA, Warden

Respondent.

Case No. C 98-02002 MMC

NOTICE OF MOTION AND MOTION PURSUANT TO FRCP 60(b)(6) TO RECONSIDER AND VACATE PREVIOUS ORDER DENYING FIRST MOTION MADE PURSUANT TO FRCP 60(b)(5)

PLEASE TAKE NOTICE that as soon as the matter may be heard in the above-entitled Court, petition Kevin L. Phelps, proceeding in pro se, will move the Court to reconsider and vacate its previous order denying his first motion made pursuant to **Rule 60(b)(5)** of the **Federal Rules of Civil Procedure.**

The motion is made on the following grounds: 1) an intervening change on the law renders the Court's previous order dismissing petitioner's petition for writ if habeas corpus as untimely clearly erroneous, contrary to law, and a manifest injustice; and 2) and intervening change in the law renders the Court's previous order denying petitioner's first motion made pursuant to Rule 60(b)(5) as being a

successive petition for writ of habeas corpus clearly erroneous, contrary to law, and a manifest injustice.

The motion is based **on Rule 60(b)(5)** of the **Federal Rules of Civil Procedure**, the Ninth Circuit's opinions in **Phelps v, Alameda, 366 F.3d 722 (9th Cir. 2004), Bunney v. Mitchell, 262 F.3d 973 (9th Cir. 2001), Corjasso v. Ayers, 278 F.3d 874 (9th Cir, 2002), Allen v. Lewis, 295 F.3d 1046 (unanimous enbanc) (9th Cir. 2002), Biggs v. Duncan, 339 F.3d 1045 (9th Cir. 2003)**, and the United States Supreme Court's opinion in **Gonzalez v. Crosby, 125 S.Ct. 2641 (2005)**.

Additionally, the motion is based on this notice, the attached memorandum of points and authorities, and all papers and pleadings on file in this action.

DATED: 11-15-2006

/s/

Kevin L. Phelps
Petitioner In Pro Se

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Folsom State Prison
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In Pro Se

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KEVIN PHELPS,

Petitioner,

v.

EDWARD ALAMEIDA, Warden

Respondent.

Case No. C 98-02002 MMC

MOTION PURSUANT TO FRCP 60(b)(6) TO RECONSIDER AND VACATE PREVIOUS ORDER DENYING FIRST MOTION MADE PURSUANT TO FRCP 60(b)(5); POINTS AND AUTHORITIES IN SUPPORT THEREOF

PROCEDURAL HISTORY

After being convicted of first degree murder, and sentenced to an indeterminate term of 30 years to life in state prison, petitioner (through retained counsel) both appealed and filed a habeas petition in the California Court of Appeal, First Appellate District. The appeal was denied on October 28, 1996, and the habeas petition was denied on February 6, 1997. Petitioner petitioned the California Supreme Court for review of the decision on direct appeal as well as the denial of the petition for writ of habeas corpus. The California Supreme Court denied review of the direct appeal decision on January 15, 1997,

and denied review of the habeas petition denial by the Court of Appeal on April 30, 1997.

Petitioner, through retained counsel, proceeded to federal court and filed his federal habeas petition on May 15, 1998. Respondent filed a motion to dismiss the petition as untimely. This Court requested supplemental briefing on the issue. On December 28, 1998, this Court granted respondent's motion to dismiss the petition as untimely, concluding that an order of the California Supreme Court denying a petition for review is effective upon filing. Petitioner filed a notice of appeal, this Court granted a partial certificate of appealability, and on March 29, 2000, the decision of this court was affirmed by the Ninth Circuit.

On February 25, 2002, petitioner filed a motion under Federal Rule of Civil Procedure 60(b)(5) in this Court, seeking reconsideration of this Court's earlier denial of his petition for writ of habeas corpus. Petitioner's motion was based on intervening changes in law that held his initial petition to be timely. On March 26, 2002, this Court denied petitioner's motion. This Court construed the motion as a successive habeas petition, and held that it could not be ruled upon by the Court without precertification by the Ninth Circuit Court of Appeals.

On April 15, 2002, petitioner filed an application for Certificate of Appealability ("COA"), which this Court denied, reciting that there was no substantial showing of denial of a constitutional right. Petitioner timely appealed and applied for a COA in the Ninth Circuit Court of Appeals. A motions panel granted a COA, but specifically styled the issue as whether the this Court erred in construing petitioner's motion to reinstate his 28 U.S.C. § 2254 petition pursuant to Fed.R.Civ.P. 60(b)(5) as a successive petition. The Ninth Circuit Court later reviewed the propriety of granting the COA and vacated the COA as being improvidently granted. (**Phelps v. Alameda, 366 F.3d 722 (9th Cir. 2004).**

In reviewing the issuance of the COA, the

Ninth Circuit Court found that this Court's denial f the 60(b)(5) motion presented a jurisdictional dilemma. In describing the dilemma, the Ninth Circuit determined that irrespective of the "successive petition" alternative holding, this Court simply denied petitioner's Rule 60(b)(50 motion on the merits, a ruling as to which no COA had been granted. Thus, any decision by the Ninth Circuit Court would offer no relief. The Court further determined that if this Court's successive petition ruling were indeed correct, the dismissal of petitioner's motion stand. If the successive application ruling were erroneous, the result would be the same: Petitioner's motion would still be unsuccessful because this Court had already denied on the merits. However, in making this determination the Ninth Circuit Court did not establish this Court's successive petition ruling as a bar to a future Rule 60(b) motion. The Ninth Circuit Court noted that there should be no important consequences of this Court's ruling that petitioner's motion was a successive petition. (Phelps, supra, at 729 fn. 7).

Following the above-referenced Ninth Circuit decision, petitioner began urging retained counsel, Robert J. Beles, to renew a Rule 60(b) motion based on intervening changes in law that rendered petitioner's previous habeas petition timely. Retained counsel would not commit to renewing the Rule 60(b) without the receipt of additional funds from petitioner's family.

With the assistance of a fellow prisoner who is knowledgeable in the law, petitioner was able prepare and file pro se a Rule 60(b) motion in this Court on April 27, 2006. In an Order dated June 7, 2006, this Court acknowledge receipt of petitioner's pro se motion, and struck the motion because petitioner was prohibited from acting without counsel of record. The order striking the motion further stated that petitioner's motion had failed to set forth any cognizable ground to warrant reconsideration of the Court's prior order. **(See true and correct copy of Court Order dated June 7, 2006,**

attached hereto as Exhibit A.)

After receiving this Court's order striking the pro se Rule 60(b) motion, petitioner contacted retained counsel and requested that he notify this Court of his withdrawal as counsel. On August 28, 2006, retained counsel filed a notice of substitution of counsel, in which petitioner joined, stating that he was being substituted by petitioner representing himself. **(See true and correct copy of Notice of Substitution of Counsel-Civil, attached hereto as Exhibit B.)**

Former counsel having been properly substituted, and petitioner now proceeding pro se before this Court, petitioner renews his previously striken Rule 60(b) motion, and set forth therein cognizable grounds that warrant reconsideration of this Court's prior order.

MEMORANDUM OF POINTS AND AUTHORITIES

I

STANDARD FOR RECONSIDERATION

It is well settled in the Ninth Circuit, and the District Courts of California that reconsideration is appropriate and justified where: (1) district court is presented with newly –discovered evidence or committed clear error; (2) the initial decision was manifestly unjust; or (3) if there is an intervening change in controlling law. **[Nunes v. Ashcroft, 375 F.3d 805, (9th Cir. 2004); Fleener v. Trinity Broadcasting Network, 203 F.Supp.2d 1142 (C.D. Cal. 2001); Doe By and Through Doe v. Petaluma City School Dist., 949 F.Supp. 1415 (N.D.Cal. 1996); U.S. v. Westlands Water Dist., 134 F.Supp.2d 1111 (E.D. Cal. 2001); Polites v. United States, 364 U.S. 426, 81 S.Ct. 202, 5 L.Ed.2d 173 (1960)].**

The granting of a motion for reconsideration is a matter of discretion for the district court and is appropriate if the district court committed clear error, or if there is an intervening change in the controlling law upon which the district court's prior

decision was based. **[Sanchez v. Johnson, 301 F.Supp.2d 1060 (N.D. Cal. 2004)]**. Federal Ruled of Civil Procedure 60(b)(6) authorizes that district court to set aside a judgment if a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgement should have prospective application. **(Nunes v. Ashcroft, 375 F.3d 805 (9th Cir. 2004).** A clear and Authorization change in the law may authorize Rule 60(b) relief even if an appeal was never taken or was abandoned. **(Polites v. U.S., 364 U.S. 426, 81 S.Ct. 202, 5 L.Ed.2d 173 (1960).** The application of the criteria set forth in the established standard makes reconsideration appropriate and justified in this case.

II

GROUNDS FOR RECONSIDERATION

AN INTERVENING CHANGE IN CONTROLLING LAW RELATING TO TIMELINESS OF PETITIONER'S HABEAS PETITION RENDERS THIS COURT'S PRIOR DISMISSAL OF THE PETITION CLEARLY ERRONEOUS

On February 6, 1997, the California Court of Appeal denied petitioner's petition for writ of habeas corpus. Petitioner timely filed a petition for review in the California Supreme Court seeking review of the Court of Appeal habeas denial. On April 30, 1997, the California Supreme Court denied petitioner's petition for review.

On May 15, 1998, petitioner filed a federal habeas corpus petition in this Court. On August 6, 19978, Respondent filed a motion to dismiss the petition on the grounds that it was filed fifteen (15) days too late. In response petitioner argued that under Rule 24 of the California Rules of Court, the Supreme Court's decision was not final until thirty (30) days after issuance, or May 30, 1997, and thus the petition was within the one (1) year statute of

limitations.

On December 28, 1998, this Court dismissed the petition, ruling that because the Supreme Court did not issue a written opinion, the habeas corpus denial was immediately final. The Ninth Circuit of Appeal affirmed this Court's dismissal in an unpublished memorandum opinion in May 2000.

The issue of finality of a California Supreme Court denial of a habeas corpus petition was not clear a the time this Court decided the timeliness of petitioner's federal habeas corpus petition. On August 16, 2001, the Ninth Circuit Court decided **Bunney v. Mitchell, 262 F.3d 973 (9th Cir. 2001)**, and held that the California Supreme Court's order denying a petition for habeas corpus is final thirty (30) days after its issuance. In Bunney, supra, the Ninth Circuit had originally affirmed the district court's dismissal of the habeas petition, but had withdrawn their opinion, noting that the Ninth Circuit had ruled otherwise in two unpublished decisions, **Morgan v. Fairman, No. 99-5546, 234 F.3d 1277, 2000 WL 115976 (9th Cir. 2000) (unpublished table decision)** and **Washington v. Lindsey, No. 99-55149, 217 F.3d 848, 2000 WL 553454 (9th Cir. 2000) (unpublished table decision)**. These decisions relied on **People v. Carrington, 40 Cal.App.3d 647 (1974)**, which had held that a denial of a "writ petition" is a "decision" within the meaning of Rue 24 of the California Rules of Court. Recognizing that **Carrington** did not involve a habeas petition and that the law appear unclear, the Ninth Circuit then certified the question to the California Supreme Court. The California Supreme Court denied certification, however, and informed the panel that it was in the process of revising its rules. The Ninth Circuit then followed **Carrington** and the previously issued unpublished decisions, holding that the Supreme Court's denial of a habeas corpus petition is not final until thirty (30) days after its issuance.

Recognizing the change in controlling law governing the finality of state court habeas corpus denials announced in **Bunney v. Mitchell, supra,**

the California Attorney General's Office began withdrawing previously asserted claims that habeas petitions should be dismissed for failure to file before expiration of limitations. **(See Notice of Withdrawal of Claim That Petition For Writ of Habeas Corpus Must Be Dismissed For Failure to File Before Expiration of Limitations Period from two California Deputy Attorney Generals, Catherine T. Okawa, dated 10-02-01 attached hereto as Exhibit C, and Judy Kaida, Re: Robert Valdez, SB 3-27-03, attached hereto as Exhibit D.)**

On December 19, 2001, the Ninth Circuit Court decided **Smith v. Duncan, 274 F.3d 1245 (9th Cir. 2001)**. In that case, the Ninth Circuit Court affirmed **Bunney v. Mitchell, supra,** holding that the additional thirty (30) days, combined with other applicable tolling provisions, rendered the federal petition timely filed on the day before the one (1) year statute of limitations expired.

On January 17, 2002, the Ninth Circuit Court decided **Corjasso v. Ayers, 278 F.3d 874 (9th Cir. 2002)**. In that case the Court followed **Bunney** and **Smith**, holding that the California Supreme Court's denial of a habeas writ petition is not final until thirty (30) days after its issuance. The Court specifically noted that: "Rule 24(a) of the California Rules of Court provides that a decision of the Supreme Court becomes final thirty (30) days after filing. The denial of a writ petition, even a denial without opinion, is a decision within the meaning of Rule 24."

In the case at bar, in the motion to dismiss respondent made much of some perceived distinction between an original petition for writ of habeas corpus and a petition for review in the California Supreme Court, following a lower court's denial of a habeas petition. In 2003 the Ninth Circuit decided **Biggs v. Duncan, 339 F.3d 1045 (9th Cir. 2003)**, a case indistinguishable in many respects from petitioner's. Like the petitioner in **Biggs, supra,** petitioner filed a petition for review rather than an original petition for writ of habeas corpus in the California Supreme

Court following the Court of Appeal denial of his habeas petition. And like the petitioner in **Biggs, supra,** petitioner asserted that the California Supreme Court's denial of his petition for review became final thirty (30) Clays after its issuance.

In **Biggs, supra**, the court noted the course of action typically taken by those bringing habeas corpus applications in the California Courts. The court found that a California petitioner brings a petition for writ of habeas corpus in the state's Superior Court. If it is denied, the petitioner asserts the claims in a new petition in the California Court of Appeal. If the Court of Appeal denies the petition, he will assert the claims in yet another new petition in, or petition for review by, the California Supreme Court. For finality of judgement purposes, the court noted no distinction between an original petition for writ of habeas corpus or petition for review.

Relying on **Bunney v. Mitchell, suppra,** the **Biggs** court held that when a petition for review is filed in the California Supreme Court following a lower court's denial of a habeas petition, the denial of the petition for review becomes final thirty (30) days after its issuance. **Biggs, supra,** at 1047.

This Court did not reach the merits of the petition, but dismissed it based on a misapplication of the one (1) year statute of limitations. In doing so, this Court decided an ambiguous issue without the benefit of any available clarifying published authority to settle the issue. At the time of this Court's dismissal of petitioner's federal habeas petition, there was no Ninth Circuit authority available on the issue of whether the California Supreme Court' s denial of a habeas petition is immediately final, or not final until thirty (30) days after its issuance. Thus, although the petition was timely filed, petitioner never received his day in court. Not only has the change in the controlling law rendered this Court's prior decision clearly erroneous, but under these circumstances, failing to reconsider and vacate the prior order dismissing the petition under Rule 60(b)(6) would result in a manifest injustice.

THIS COURT COMMITTED CLEAR ERROR BY RULING PETITIONER'S MOTION PURSUANT TO RULE 60(b)(5) WAS A SUCCESSIVE APPLICATION FOR A WRIT OF HABEAS CORPUS

On February 21, 2002, petitioner filed a motion pursuant to Federal Rule of Civil Procedure 60(b)(5) with this Court seeking reconsideration of its earlier dismissal of his habeas petition on the basis of untimeliness. Petitioner's motion for reconsideration was made on the grounds that, subsequent to this Court's dismissal of the petition, and the Ninth Circuit Court's affirmance of the dismissal, there had been a change in the applicable law that would render the petition timely filed.

On March 26, 2002, this Court denied the motion on the grounds that Ninth Circuit authority held that a change in the applicable law after a judgement has become final in all respects is not a sufficient basis for vacating the judgement under Rule 60(b)(5), and that Ninth Circuit authority held that the motion pursuant to Rule 60(b)(5) had to be construed as a successive application for a writ of habeas corpus. This Court determined that it lacked subject ratter jurisdiction to determine whether the change in law would entitled petitioner to relief, and held that petitioner had to seek an order from the Ninth Circuit authorizing this Court to consider the "successive" application. (See Order Denying Petitioner's Motion to Reinstate Pursuant to FRCP 60(b)(5), N.D.Cal., March 6, 2002, attached hereto as Exhibit E.)

On June 23, 2005, the United States Supreme Court decided **Gonzalez v. Crosby, 125 S.Ct. 2641 (2005)**, a case factually identical to petitioner's case. Like petitioner, the petitioner in **Gonzalez**, **supra**, filed s federal petition for writ of habeas corpus challenging his conviction. The United States District Court for the Southern District of Florida dismissed the petition as timer-barred, and denied a

certificate of appealability. The Eleventh Circuit Court of Appeals also denied a certificate of appealability. The petitioner then moved for relief from judgement pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. The District Court denied the motion. The petitioner appealed. The Eleventh Circuit Court of Appeals quashed the Certificate of Appelability as improvidently granted. The Court then vacated the order quashing the COA and affirmed the denial of the motion, holding that the Rule 60(b) motion was in substance a second or successive habeas petition, which under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)., 28 U.S.C § 2244(b), cannot be filed without precertification by the court of appeals.

In **Gonzalez, supra**, the Supreme Court held that because the petitioner's Rule 60(b) motion challenged only the district court's previous ruling on AEDPA's statute of limitations, it is not the equivalent of a successive habeas petition and can be ruled upon by the district court without precertification by the Court of Appeal. (**Gonzalez, supra, at 2643**.)

The **Gonzalez** Court further held that a Rule 60(b) motion is not to be treated as a successive habeas petition if it does not assert, or reassert, claims or error in the movant's state conviction. In petitioner's case, the sole issue raised in the Rule 60(b)(5) motion was the applicability of a change in the controlling law relating to this Court's dismissal of his habeas petition as time-barred. **(Ex. E.)** The **Gonzalez** Court has specifically held that such a motion can be ruled upon by the district court without precertification by the Court of Appeals pursuant to § 2244(b)(3). (**Gonzalez, supra, at 2651**).

This Court's ruling that petitioner's Rule 60(b)(5) motion had to be construed as a successive petition, that it lacked jurisdiction to determine whether the change in the law would entitle petitioner to relief, and that petitioner was required to move in the Court of Appeals for a order authorizing this Court to consider the [successive]

application was contrary to clearly established federal law, as determined by the Supreme Court of the United States. The law relating to motions made pursuant to Rule 60(b), as expressed by the Supreme Court of the United States, renders this Court's prior orders clearly erroneous. Failing to reconsider and vacate the previous order denying petitioner's Rule 60(b(5) motion under Rule 60(b)(6) would result in a manifest injustice.

Based on the foregoing, this Court should grant the instant motion and vacate its previous order denying petitioner's first motion made pursuant to Rule 60(b)(5).

Dated: 11-15-2006

Respectfully submitted,

/s/

Kevin L. Phelps
Petitioner In Pro Se

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEVIN PHELPS, Petitioner-Appellant,

v.

EDWARD ALAMEDA, Warden, Duel Vocational Institution, Tracy, California; PEOPLE OF THE STATE OF CALIFORNIA ex rel. BILL LOCKYER, Respondents-Appellees

No. 02-15821

USDC No: CV-98-02002-MMC

Opinion

Appeal from the United States District Court for the Northern District of California; Maxine M. Chesney, District Judge, Presiding

Phelps v. Alameda, 2000 U.S. App. LEXIS 5954 (9th Cir. Cal., Mar. 29, 2000)
August 12, 2003, Submitted

* The panel unanimously finds this case suitable for decision without oral argument. Fed. R App. P. 34(a)(2)

Filed April 20, 2004

COUNSEL: Robert J. Beles, Oakland, California, for the appellant.

Bill Lockyer, Attorney General of the State of California, Robert R. Anderson, Chief Assistant Attorney General, Gerald A. Engler, Senior Assistant Attorney General, Peggy S. Ruffra, Supervising Deputy Attorney General, and Juliet B. Haley, Deputy Attorney General, for the appellee.

JUDGES: Before: Cynthia Holcomb Hall, Diarmuid F. O'Scannlain, and Edward Leavy, Circuit Judges

OPINION BY Judge Diarmuid F. O'Scannlain

OPINION

Diarmuid F. O'Scannlain, Circuit Judge:

We must decide whether we should vacate, as improvidently granted, a Certificate of Appealability issued by a motions panel pursuant to the Antiterrorism and Effective Death Penalty Act.

I

Kevin Phelps was convicted of first degree murder in a California state court in 1995 and has exhausted all relevant state remedies. On May 15, 1998, he filed a habeas corpus petition in the Northern District of California one year and fifteen days after the California Supreme Court declined to review a previous denial of state habeas corpus relief. The district court denied the petition based upon its having been lodged more than a year after his state post-conviction relief process ended.[1] *See* 28 U.S.C. § 2244(d). On appeal, we affirmed in an unpublished disposition. *See Phelps v. Alameda*, No. 99-15495, 2000 WL 329180 (9th Cir. Mar. 29, 2000).

Two years later, Phelps filed a motion under Federal Rule of Civil Procedure 60(b)(5) with the same district court, seeking reconsideration of the earlier denial of his petition for writ of habeas corpus. He argued that *Bunney v. Mitchell*, 262 F.3d 973 (9th Cir. 2001), among other cases, effected an

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[1] Because the state court's action was an order rather than an opinion, it became final upon filing. See Cal. Rules of Court 24(a) since amended, with corresponding provision now appearing in Rule 29.4(b)(2) ("An order of the Supreme Court denying a petition for review of a decision of a Court of Appeal becomes final when it is filed.")

intervening change in the law suggesting that his initial petition had indeed been timely. *See* Fed.R.Civ.P. 60(b)(5) (allowing a district court to revise an order if "a prior judgment upon which it is based has been reversed or otherwise vacated").

The district court squarely rejected Phelps's motion on the merits:[2]

> Assuming, *arguendo*, that the subsequent cases upon which petitioner relies have changed the applicable law,[ ] the Ninth Circuit has held that "a change in the applicable law after a judgment has become final in all respects is not a sufficient basis for vacating a judgment" under Rule 60(b)(5). *See Tomlin v. McDaniel*, 865 F.2d 209, 210 (9th Cir. 1989). . . . Consequently, petitioner is not entitled to relief under Rule 60(b)(5).

The court added, however, that "the Ninth Circuit has held that where a habeas corpus petitioner files a motion for relief from a final judgment under Rule 60(b), based on a subsequent change in law, the motion should be construed as a successive application for a writ of habeas corpus." Consequently, the district court ruled, in the alternative, that it "lacked subject matter jurisdiction to determine whether the change in the law would entitle petitioner to relief."[3]

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[2] We use the term "merits" somewhat loosely here, for, of course, a decision to dismiss a Rule 60(b) motion means that the district court will *not* reconsider the underlying merits of the case. Instead, "merits" in this context relates to the court's consideration of the substance of Phelps's claim that a Rule 60(b) motion should be granted.

[3] Although somewhat ambiguous, we must interpret the discussion of subject-matter jurisdiction as an alternative holding for at least two reasons. First, the district court's subsequent denial of a Certificate of Appealability nowhere mentions the jurisdictional issue, and states only that the earlier decision was "based on settled Ninth Circuit law that a change in the applicable law after a judgment has become final in all respects is not a sufficient basis for vacating a judgment

(continued...)

Phelps thereupon filed an application for a Certificate of Appealability ("COA"), which the district court denied, reciting that there was no "substantial showing of the denial of a constitutional right." *See* § 2253(c). Phelps timely appealed and applied for a COA from us under Federal Rule of Appellate Procedure 22(b). A motions panel granted a COA, but specifically styled the issue as "whether the district court erred in construing petitioner's motion to reinstate his 28 U.S.C. § 2254 petition pursuant to Fed. R. Civ. P[ ]. 60(b)(5) as a successive application under 28 U.S.C. § 2244(b)." *Phelps v. Alameda*, No. 02-15821 (9th Cir. Dec. 2, 2002) (order granting partial COA).

(...continued)
under Rule 60(b)(5)" (internal quotation omitted). Second, given the district court's simultaneous denial of Phelps's Rule 60(b) motion on the merits, we must seek to avoid the constitutional tension that a contrary interpretation likely would engender. *See Christopher v. Harbury*, 536 U.S. 403, 417, 122 S.Ct. 2179, 153 L.Ed.2d 413 (2002) (highlighting "the obligation of the Judicial Branch to avoid deciding constitutional is-sues needlessly"); *Willy v. Coastal Corp.*, 503 U.S. 131, 138, 112 S.Ct. 1076, 117 L.Ed.2d 280 (1992) (noting the constitutional "issue of a district court adjudicating the merits of a 'case or controversy' over which it lacks jurisdiction"); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981) (holding that "[a] court lacks discretion to consider the merits of a case over which it is without jurisdiction").

We recognize more generally that an adverse jurisdictional determination stands at apparent odds with the rendering of an alternative holding on the merits of the same case. Nevertheless, we have held that "alternative holdings are a common practice that prevents the overconsumption of adjudicative resources" and "do not divest the adjudicator of jurisdiction merely because they are inconsistent." Container *Stevedoring Co. v. Dir., Office of Workers Comp. Programs*, 935 F.2d 1544, 1549 n. 5 (9th Cir.1991).

II

As a threshold matter, we must confess that we have some doubt as to our jurisdiction over this appeal. *See infra* Part III. But to what extent, as a merits panel, are we bound by the operative COA, and are we compelled to decide the issue presented by it?

[1] In federal habeas corpus proceedings, of course, the exercise of appellate jurisdiction is dependent entirely upon the issuance of a COA. 28 U.S.C. § 2253(c); *Lord v. Lambert*, 347 F.3d 1091, 1094 (9th Cir. 2003). The circuits, however, are split on the question of whether the COA need be examined in every case. Compare *United States v. Cepero*, 224 F.3d 256, 261-62 (3d Cir. 2000) (en banc) (stating that "we must reject the analysis of our sister circuits" because "the issuance of the certificate in the case before us is not merely an exercise of judicial gate-keeping, but rather, in the language of the [Supreme] Court, is 'the judicial determination of a case or controversy, reviewable on appeal to the Court of Appeals'" (quoting *Hohn v. United States*, 524 U.S. 236, 246, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998) in turn quoting *Ex parte Quirin*, 317 U.S. 1, 24, 63 S.Ct. 2, 87 L.Ed. 3 (1942))), with *Soto v. United States*, 185 F.3d 48, 52 (2d Cir. 1999) ("[A] certificate of appealability that does not meet the denial of a constitutional right requirement-and hence, is erroneously issued-nevertheless suffices to confer appellate jurisdiction."), *United States v. Talk*, 158 F.3d 1064, 1068 (10th Cir. 1998) ("Although the absence of a certificate precludes an appeal, an erroneously issued certificate does not deprive us of jurisdiction to hear a certified appeal."), and *Young v. United States*, 124 F.3d 794, 799 (7th Cir.1997) ("The absence of a certificate of appealability precludes an appeal; should an erroneously issued certificate be treated the same as the lack of a certificate? We think not."); cf. *Peguero v. United States*, 526 U.S. 23, 119 S.Ct. 961, 143 L.Ed.2d 18 (1999) (ruling on the merits of a claim for collateral relief even though the government pointed out in its brief that the COA

may have been improperly granted).

[2] We follow the majority view that merits panels are not required to examine allegedly defective COAs in the face of jurisdictional challenges. While "the issuance of a certificate of appealability is a prerequisite to our assertion of jurisdiction, once that certificate is issued, we have jurisdiction even if the certificate was arguably 'improvidently granted.' " *James v. Giles*, 221 F.3d 1074, 1076 (9th Cir.2000); *see* also *Gatlin v. Madding*, 189 F.3d 882, 887 (9th Cir.1999) (holding that once a COA "has been issued without objection by this court, the procedural threshold for appellate jurisdiction has been passed and we need not revisit the validity of the certificate in order to reach the merits").

[3] However, we do not appear directly to have decided the related question of whether a panel has the power to address the propriety of a COA of its own accord. Our fellow circuits appear to be split on this particular question as well: Compare *LaFevers v. Gibson*, 182 F.3d 705, 711 (10th Cir.1999) (comparing COAs to the old Certificates of Probable Cause in holding that once "the district court has made appealable all the issues in this case by its blanket order, we must review the merits of each claim"), with *Khaimov v. Crist*, 297 F.3d 783, 786 (8th Cir.2002) (holding that "circumscribing, and even revoking, a certificate, especially one we have issued, is ... well within our authority"), and *United States v. Marcello*, 212 F.3d 1005, 1007-08 (7th Cir.2000) (holding that "the best approach is to say we have discretion to decide the case by reviewing the validity of the COA").[4]

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[4] The Third Circuit also has indicated that merits panels have such authority, given that they are required to review COAs. See *Cepero*, 224 F.3d at 261-62. Second Circuit jurisprudence is somewhat less clear, although relevant precedent suggests that a merits panel may at least ignore an improper COA in certain circumstances. See, *e.g.*, *Rhagi v.Artuz*, 309 F.3d 103, 105 (2d Cir. 2002) (dismissing a case (continued...)

[4] Section 2253(c) specifies only three things about COAs: that they must issue before an appeal may be taken, § 2253(c)(1), that they may be granted only upon "a substantial showing of the denial of a constitutional right," § 2253(c)(2), and that they must specify the issues to be considered on appeal, § 2253(c)(3). Unfortunately, then, § 2253(c) itself provides no insight into the question of whether and to what extent we may review a previously issued COA.

Our own relevant precedent, however, provides key insight into this question. When first confronted with the reviewability of COAs in *Gatlin*, we took a narrow approach, declining to address the propriety of a COA upon the motion of a party because there had been no challenge to it within the appropriate 35 day window as set forth by our Circuit Rule 22-1(c). *See Gatlin*, 189 F.3d at 887 ("Given a ready procedure for response by the state to requests for COAs in this court, it would be counter-productive to require merits panels to reconsider every one that is issued.").

[5] But at the time the COA had been issued in the James case, our circuit rules had not yet provided for this 35 day opportunity to challenge a COA. *See James*, 221 F.3d at 1077 ("The State here argues that, because James' motion in this court for a certificate of appealability was made prior to the adoption of 9th Cir. R. 22-1(c), the State cannot be bound by a failure to file a response."). As a result, our merits panel proceeded to consider whether the COA properly was issued by the district court. *See id.* at 1077-79 (upholding issuance of the COA). If the propriety of the COA were entirely unreviewable, such action presumably would not have been

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(...continued)
because "no COA has been granted that would permit appellate review," although "the District Court actually did issue a COA," it was "deficient"). But see *Valverde v. Stinson*, 224 F.3d 129, 136 (2d Cir. 2000) (understanding Soto as "holding that merits panel may not revisit motion panel's decision to grant a certificate of appealability").

appropriate, regardless of whether Circuit Rule 22-1(c) was on the books.[5] Thus, we are satisfied that COAs are not beyond merits panel scrutiny.

[6] This conclusion is further supported by a closely analogous principle: We do have the power to expand the scope of a COA to include additional issues, even if they previously had been deemed inappropriate for review. *See, e.g., Nardi v. Stewart*, 354 F.3d 1134, 1136-40 (9th Cir.2004) (expanding a COA to include a claim that both the district court and a motions panel previously had declined to certify); *Valerio v. Crawford*, 306 F.3d 742, 764 (9th Cir. 2002) ("[A] court of appeals not only has the power to grant a COA where the district court has denied it as to all issues, but also to expand a COA to include additional issues when the district court has granted a COA as to some but not all issues."); *Hiivala v. Wood*, 195 F.3d 1098, 1104 (9th Cir. 1999) ("A merits panel may ... expand the issues for review to include issues that the motions panel specifically rejected."). These cases conclusively demonstrate that the issuance of a COA is not entirely insulated from subsequent judicial scrutiny. And the fact that we have the power to grant or to expand a COA strongly implies that we have the commensurate power to vacate or to contract it.[6]

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[5] It would be difficult to understand Circuit Rule 22-1(c) itself as an independent and sufficient mechanism insulating COAs from judicial review. It merely sets forth a procedure by which parties can challenge the issuance of a COA. It does not thereby act of its own accord entirely to prevent a merits panel from examining the issue if necessary. A party's failure to comply with Rule 22-1(c) is more properly understood as a waiver of any challenge to a COA. And when a party waives issues on appeal, we generally do not impose an absolute barrier against their consideration. *See, e.g., Koerner v. Grigas*, 328 F.3d 1039, 1048-49 (9th Cir. 2003) (listing exceptions to the normal rule that parties waive issues not specifically and distinctly argued in their opening briefs).

[6] Whether originally issued by a district court or a motions panel, "rulings on jurisdictional issues do not bind a

(continued...)

Of course, we must be ever mindful of the "gate-keeping and efficiency functions of the certificate of appealability." *James*, 221 F.3d at 1079. In many cases, our examination of the adequacy of a COA simply does not further these goals, and the effective deployment of substantial legal resources favors turning directly to the merits. This may be particularly true either because no one has challenged the COA, *see id.* (declining to address the issuance of a COA "on a ground never raised by the parties"), or because the parties have already fully briefed the issues it encompasses, *see Buie v. McAdory*, 322 F.3d 980, 982 (7th Cir.2003) (stating that review of a COA is not often appropriate once "the appeal has been fully briefed by the time the respondent gets around to moving to vacate the certificate of appealability").

Nevertheless, the pursuit of efficiency alone does not support an absolute bar against examining the validity of a COA. In many instances, few legal resources may have been spent by the time a party challenges a COA. So if "briefing has not yet begun but the certificate has identified a constitutional issue of dubious substantiality," it may make a good deal of sense to consider a challenge to a COA. *Buie*, 322 F.3d at 982; cf. 9th Cir. R. 22-1(c) & (d) (providing a mechanism by which a party may challenge whether a COA should issue or be expanded).

Moreover, there may be competing concerns involved, and in exceptional circumstances the vacatur of a COA may be appropriate regardless of the investment of time and energy into the case. For example, the issuance of a COA may have been so far off the mark that the certificate is simply invalid on its face. If we had no power to vacate COAs, we would be unable adequately to participate in the

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merits panel" of this Court. *Hiivala*, 195 F.3d at 1104. Therefore, the "doctrine of 'law of the case' does not preclude" our power to review the issuance of a COA. *Id.*

proper administration of § 2253(c). The decision to grant a COA would "effectively be unreviewable on appeal," a highly disfavored result. *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003) (asserting jurisdiction in an interlocutory appeal in part because to do otherwise would insulate the lower court's ruling); *see* also *Ramunno v. United States*, 264 F.3d 723, 725 (7th Cir. 2001) ("Vacating a certificate of appealability is an unusual step ... but the possibility of review is essential if the statutory limits are to be implemented. Otherwise district judges have the authority to issue certificates of appealability for any reason at all, and as open-ended as they please.").

[7] Based on our review of the relevant precedent, we are satisfied that although a merits panel generally need not examine the propriety of a COA, it nevertheless retains the power to do so.

III

[8] And now to our jurisdictional dilemma in this case: Irrespective of the "successive petition" alternative holding, the district court simply denied Phelps's Rule 60(b) motion on the merits, a ruling as to which no COA has been granted. Thus, any decision by us would offer no relief. If the district court's successive petition ruling were indeed correct, the dismissal of Phelps's motion would stand. If the successive application ruling were erroneous, the result would remain the same: Phelps's motion would still be unsuccessful because the district court has already denied it on the merits. In other words, no matter how we rule on appeal, Phelps's Rule 60(b) motion fails.[7]

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[7] We note that there should be no important future consequence of the lower court's ruling that this was a successive petition. *See Hill v. Alaska*, 297 F.3d 895, 898 (9th Cir. 2002) ("That a prisoner has previously filed a federal habeas petition does not necessarily render a subsequent petition 'second or successive.'"); *Calderon v. U.S. Dist. Court*, (continued...)

A.

Alternative holdings may be valuable tools of judicial administration, but they can present potential advisory opinion problems. *See, e.g., Karsten v. Kaiser Found.* Health Plan, 36 F.3d 8, 11-12 (4th Cir. 1994) (noting that alternative holdings often "provide courts, particularly appellate courts reviewing alternative holdings below, with the tempting opportunity to stray into the practice of advisory opinion-making, solving questions that do not actually require answering in order to resolve the matters before them"). Normally, such forays onto what might be described as thin jurisprudential ice are acceptable consequences of our continuing pursuit of justice and finality. Cf., *e.g., Harris v. Reed*, 489 U.S. 255, 264 n. 10, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989) (noting that by use of alternative holdings, "a state court may reach a federal question without sacrificing its interests in finality, federalism, and comity").

But habeas corpus petition cases are unique: Under AEDPA, we simply "lack jurisdiction to resolve the merits of any claim for which a COA is not granted." *Beaty v. Stewart*, 303 F.3d 975, 984 (9th Cir. 2002). Consequently, we may be presented with a case, such as this one, where resolution of any issue on appeal may not "affect the matter in issue in the case before" us. *Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 40 L.Ed. 293 (1895).

In this respect, the limited jurisdiction preserved by the grant of a COA is not unlike the Supreme Court's authority over state-court decisions. Because the high Court does not exercise jurisdiction

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163 F.3d 530, 538 (9th Cir. 1998) (en banc) abrogated on other grounds by *Woodford v. Garceau*, 538 U.S. 202, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003) ("We conclude that even after the AEDPA, the rule is as it has always been: Resjudicata does not apply to habeas cases.").

over purely state-law issues, an "adequate and independent" state-law ground for decision essentially makes any federal issues superfluous, and the Court will not consider them. *See Michigan v. Long*, 463 U.S. 1032, 1041, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision."). This approach "avoid[s] the danger of ... rendering advisory opinions." *Id.*; *see* also Local No. 8-6, *Oil, Chem. & Atomic Workers Int'l Union v. Missouri*, 361 U.S. 363, 367, 80 S.Ct. 391, 4 L.Ed.2d 373 (1960) ("[T]he duty of this Court is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." (internal quotation omitted)).

B

[9] Here, we are confronted with an "adequate and independent" federal ground for decision outside our jurisdictional purview. As a result, consideration of the issue specified by the COA in this case is inappropriate. [8] *See Kaminski v. United States*, 339

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[8] The prohibition against advisory opinions is often couched in constitutional terms, but when there are legal questions directly involving the litigants before a court—even though resolution of an issue may have no ultimate effect upon them—a disposition squarely may not implicate the Constitution. See, *e.g.*, *Long*, 463 U.S. at 1041 n. 6, 103 S.Ct. 3469 (holding that even when there is an adequate and independent state ground for decision, "[t]here may be certain circumstances in which clarification is necessary or desirable, and we will not be foreclosed from taking the appropriate action"); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 *Harv. L.Rev.* 603, 644-45 (1992) (arguing that the bar against "Supreme Court review of any

(continued...)

F.3d 84, 85 n. 1 (2d Cir. 2003) (asserting, in habeas corpus context, that "ordinarily, unless a certificate [of appealability] encompasses all of the grounds for a court's ruling on an issue, an appeal that challenges only some of the district court's grounds will be moot".[9]

Perhaps this problem might have been avoided had Phelps sought to expand the COA to include all dispositive holdings. But "[i]f a party wishes to expand the scope of a partial COA, he must follow the procedure set forth in Circuit Rule 22 1(d), which requires him to seek and obtain from the appellate court broader certification." *United States v. Christakis*, 238 F.3d 1164, 1168 n. 5 (9th Cir.2001). Not only has Phelps failed to seek certification of the district court's alternative holding, he has affirmatively argued against it in both his opening and reply briefs, asserting that "[a]ny other

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(...continued)
state judgment for which there is or may be an adequate and independent state ground of decision" is "a function of judicial discretion"). But *see Powell v. McCormack*, 395 U.S. 486, 496 n. 7, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969) ("The rule that this Court lacks jurisdiction to consider the merits of a moot case is a branch of the constitutional command that the judicial power extends only to cases or controversies."). In any case, we remain bound by a longstanding line of Supreme Court precedent refusing to issue an opinion that does not affect the outcome of the case at bar. *See, e.g., Mills*, 159 U.S. at 653, 16 S.Ct. 132.

[9]. Normally, a case is rendered moot "when, by virtue of an intervening event, a court of appeals cannot grant any effectual relief whatever." *Calderon v. Moore*, 518 U.S. 149, 150, 116 S.Ct. 2066, 135 L.Ed.2d 453 (1996) (internal citation omitted). But in cases such as this, it is the imprudent decision to grant the COA that gives rise to the problem, not some extrajudicial event. Thus, "mootness" may not be the best term, and the issue is perhaps more appropriately described simply as a "jurisdictional" matter. Cf. *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) (stating "that the independent and adequate state ground doctrine is jurisdictional").

argument, such as respondent's claim that petitioner is not entitled to Rule 60(b) relief, is not before this court."

[10] In this case, if we were to entertain the only question presented to us, we would be required to render a ruling without "any effectual relief whatever," *Mills*, 159 U.S. at 653, 16 S.Ct. 132, as we are without jurisdiction to affect the denial of Phelps's Rule 60(b) motion.

IV

[11] For the foregoing reasons, we vacate the COA as improvidently granted. Because we therefore lack subject-matter jurisdiction, the appeal is

DISMISSED.

Filed March 26, 2002
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

KEVIN PHELPS,

Petitioner,

v.

EDWARD ALAMEDA,

Respondent.

No. C 98-2002 MMC (PR)

ORDER DENYING PETITIONER'S MOTION TO REINSTATE; VACATING HEARING

(Docket Nos. 29, 30)

Before the Court is petitioner's Motion to Reinstate Habeas Corpus Petition, filed pursuant to Rule 60(b)(5) of the Federal Rules of Civil Procedure. Respondent has filed opposition, to which petitioner has replied. Having reviewed the papers submitted, the Court deems the motion appropriate for decision on the papers, VACATES the hearing scheduled for April 5, 2002, and rules as follows.

On May 15, 1998, petitioner instituted the instant action by filing a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On December 28, 1998, the Court dismissed the petition as untimely. On March 29, 2000, the Ninth Circuit affirmed.

Petitioner now seeks to reinstate his petition on the ground that, subsequent to the Ninth Circuit's affirmance of the Court's dismissal of his petition, there has been a change in the applicable law that

would render his petition timely. Assuming, arguendo, that the subsequent cases upon which petitioner relies have changed the applicable law,[1] the Ninth Circuit has held that "a change in the applicable law after a judgment has become final in all respects is not a sufficient basis for vacating the judgment" under Rule 60(b)(5). See Tomlin v. McDaniel, 865 F. 2d 209, 210 (9th Cir. 1988); see also Clifton v. Attorney General of the State of California, 997 F. 2d 660, 665 (9th Cir. 1993) (applying Tomlin holding in habeas corpus proceeding). Consequently, petitioner is not entitled to relief under Rule 60(b)(5).

Rather, the Ninth Circuit has held that where a habeas corpus petitioner files a motion for relief from a final judgment under Rule 60(b), based on a subsequent change in law, the motion should be construed as a successive application for a writ of habeas corpus. See Thompson v. Calderon, 151 F. 3d 918, 921 (9th Cir. 1998) (citing Clark v. Lewis, 1 F. 3d 814 (9th Cir. 1993). At this juncture, however, this Court lacks subject matter jurisdiction to determine whether the change in the law would entitle petitioner to relief. Instead, petitioner must "move in the appropriate court of appeals for an order authorizing the district court to consider the [successive] application." See 28 U.S.C. § 2244(b)(3)(A); see also Nunez v. United States, 96 F. 3d 990, 991 (7th Cir. 1996) (holding "prior-approval device" of § 2244 "is an allocation of subject-matter jurisdiction to the court of appeals").

Accordingly, petitioner's motion to reinstate is hereby DENIED.

This order terminates Docket Nos. 29, 30.

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[1] The subsequent cases on which petitioner relies are Corjasso v. Ayers, 278 F. 3d 874 (9th Cir. 2002), Smith v. Duncan, 274 F. 3d 1245 (9th Cir. 2001), and Bunney v. Mitchell, 262 F. 3d 973 (9th Cir. 2001).

IT IS SO ORDERED.

Dated: March 26, 2002

/s/

MAXINE M. CHESNEY
United States District Judge

Filed March 29, 2000
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEVIN PHELPS,

Petitioner - Appellant,

v.

EDWARD ALAMEIDA, Warden, Deuel Vocational Institution, Tracy, California; PEOPLE OF THE STATE OF CALIFORNIA,

Respondent - Appellees.

No. 99-15493
D.C. No. CV-98-02002-MMC

KEVIN PHELPS,

Petitioner - Appellant,

v.

EDWARD ALAMEIDA, Warden, Deuel Vocational Institution, Tracy, California; PEOPLE OF THE STATE OF CALIFORNIA,

Respondent - Appellees.

No. 99-15495
D.C. No. CV-98-02003-MMC

MEMORANDUM*

Appeals from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Submitted March 17, 2000**
San Francisco, California

Before: O'SCANNLAIN, LEAVY, and RYMER, Circuit Judges.

Kevin Phelps and Jason Dorton appeal the district court's dismissal of their habeas petitions as barred by the one year statute of limitations. 28 U.S.C. § 2244(d). We have jurisdiction, 28 U.S.C. § 1291, and affirm.***

Under Section 2244(d)(2), the statute of limitations begins to run on the date that the state post-conviction relief process ended. We agree with the district court that the Supreme Court's denial was an "order denying a petition for review" under Rule 24(a) of the California Rules of Court, not a "decision of the Supreme Court." When a habeas petition fails to make out a prima facie case, the California Supreme Court rejects it as "summary denial," In re Clark, 21 Cal.Rptr.2d 509, 521 n.9 (Cal. 1993); otherwise the court will issue an order to show cause. See In re Lawler, 151 Cal.Rptr. 833, 835 (Cal. 1979). As this did not happen here, and no order granting review was ever issued so as to make the order signed by the Chief Justice a decision after

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

*** Since we affirm, Appellee's Motion to Certify State Law Issues to the California
Supreme Court is denied as moot.

review, the order became final on the day on which it was filed (April 30, 1997).

Phelps and Dorton argue that the AEDPA limitations period should be equitably tolled. However, no "extraordinary circumstances beyond a prisoner's control ma[d]e it impossible to file a petition on time." Calderon v. United States District Court (Kelly), 163 F.3d 530, 541 (9th Cir. 1998) (en banc) (internal quotations omitted). Here, counsel was notified that the petition might be denied before May 15, but failed to check with the California Supreme Court to determine whether it had been. This is quite different from Kelly, where the district court stayed habeas proceedings pending a competency determination, and Calderon v. United States District Court (Beeler), 112 F.3d 386 (9th Cir. 1997), as amended 128 F.3d 1283, where counsel preparing a habeas petition withdrew leaving a shambles. As the district court found, not even excusable neglect exists in this case, let alone extraordinary circumstances.

Finally, Phelps and Dorton submit that the district court should not have relied on a declaration by a California Supreme Court Clerk, but we decline to consider this issue as it was not certified.

AFFIRMED.

Filed December 28, 1998
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

KEVIN PHELPS and JASON DORTON,

Petitioner,

v.

EDWARD ALAMEIDA, Warden

Respondent.

No. C-98-2002 MMC
No. C 98-2003 MMC

ORDER GRANTING MOTION TO DISMISS

I. INTRODUCTION

Before the Court is respondent Edward Alameda's motion to dismiss as untimely the habeas petitions filled by Kevin L. Phelps and Jason Dorton. Respondent argues that petitioners filed their petitions two weeks late, and that the circumstances do not warrant equitable tolling of the statute of limitations. Petitioners argue that the petitions were timely filed, and even if they were not, the Court should equitably toll the limitations period.

The Court renders this decision based upon the papers filed in support of and in opposition to the motion, the arguments presented at the September 25, 1998 hearing, and the supplemental briefing.

II. BACKGROUND

Petitioners filed habeas petitions in the California Court of Appeal, which were denied. On February 14, 1997, petitioners filed timely petitions for review with the California Supreme Court. On March 27, 1997, the Chief Justice filed an order

stating: "The time for granting or denying review in the above cause is hereby extended to and including May 15, 1997, or the date upon which review is either granted or denied." (Beles Decl., Ex. A).

On April 30, 1997, the Chief Justice filed an order denying the petition on the merits. (Mazza Decl., Ex. 4). Petitioners' counsel has filed a declaration that his office never received a copy of the April 30, 1997 order. (McCarthy Decl., ¶ 4). Rule 24(a) of the California Rules of Court requires the California Supreme Court to mail copies of judgments to parties.

III. DISCUSSION

A. Legal Standard

Resolution of whether equitable tolling applies in a given case is generally not amenable to a motion to dismiss because the matter usually requires evaluation of facts outside the pleadings. Supermail Cargo, Inc. v. United States, 68 F.3d 1204, 1206 (9th Cir. 1995). "A motion to dismiss based on the running of the statute of limitations period may be granted only 'if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled.'" Id., quoting Jabon v. Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980). "In fact, a complaint cannot be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim." Id.

B. Analysis

The instant motion requires the Court to decide two basic issues: (1) did petitioners file within the statute of limitations?; and (2) if petitioners failed to do so, should the Court equitably toll the limitations period to allow the petitions to survive?

1. Statute of Limitations

A one-year statute of limitations applies to habeas petitions filed in federal district courts. Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244. In the instant case, the

one-year period is measured from "[t]he date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). The period is tolled during pendency of "a properly filed application for State post-conviction or other collateral review." 28 U.S.C. § 2244(d(2). Respondent argues that collateral review ended and the limitations period began to run on April 30, 1997, making petitioners' May 15, 1998 filings two weeks late. Petitioners argue that the limitations period did not begin until May 30, 1997, or at the earliest, May 15, 1997, making the filings timely.

a. The Denial Order

On April 30, 1998, the California Supreme Court issued an order denying the habeas corpus petitions. Under California Rules of Court, Rule 24(a), a "decision of the Supreme Court becomes final 30 days after filing," whereas an "order of the Supreme Court denying a petition for review of a decision of a Court of Appeal becomes final when it is filed." (emphasis added). Respondent argues that the denial is an *order* and thus, became final on April 30, 1997, the date of filing. Petitioners argue that the denial is a decision and thus, became final May 30, 1997, thirty days after filing.

Although the California courts have not clearly articulated the difference between a decision and an *order* in the context of Rule 24(a), California jurisprudence in related contexts suggests that the distinction turns on, whether the Supreme Court previously issued an order to show cause with respect to the habeas petition. When reviewing a habeas petition, the California Supreme Court may summarily deny a petition because a procedural bar applies or because the petitioner has failed to present a prima facie claim. See In re Robbins, 18 Cal.4th 770, 778, fn. 1 (1998) (discussing summary denials when there is a procedural bar or a failure to present a prima facie case); In re Clark, 5 Cal.4th 750, 769 n.9 (1993) (stating that summary denials are proper when petitioner fails to state a claim). The Court

concludes that these summary denials are the *orders* to which Rule 24(a) refers.

If the petition successfully states a claim, then the Court issues an order to show cause, to which the petitioner may respond by filing a return. In re Lawler, 23 Cal.3d 190, 194-95 (1979). "Once an order to show cause or alternative writ issues, however, the matter becomes a 'cause,' pursuant to the California Constitution (art. .VI, s 14) and requires a written opinion." In re Mazoros, 76 Cal. App. 3d 50, 52-53 (1977). The Court concludes that such written opinions are the *decisions* to which Rule 24(a) refers.

In the instant case, the California Supreme Court summarily denied the petitions without issuing an order to show cause. The disposition states: "Petition for review denied on the merits." (Mazza Decl., Exh. 4). Hence, the disposition is an *order* effective upon the filing date, April 30, 1997, and the statute of limitations expired one year later on April 30, 1998. Accordingly, the petitions, having been filed fifteen days later on May 15, 1998, are untimely.

Petitioners argue that the use of the phrase "on the merits" means the disposition is a decision. The Court disagrees. Summary denials are considered "on the merits" even if the phrase is not recited. Hunter v. Aispuro, 982 F.2d 344, 347-48 (9th Cir. 1992) ("The California Supreme Court's denial of a habeas petition without comment or citation constitute[s] a decision on the merits...."). Therefore, the Supreme Court's use of the phrase "on the merits" has no effect on the characterization of its ruling as an order or a decision. Rather, what distinguishes an order from a decision is the process by which the ruling was reached.

b. The Order Extending Time

Petitioners argue that even if the Supreme Court's disposition constitutes an order, the time for filing was extended until May 15, 1998—the day petitioners filed the writs. Petitioners base this argument on the order dated March 27, 1998, which stated: "The time for granting or denying review in the above cause is hereby extended to and including, May 15, 1997, or the date upon which review is either granted or denied." (Beles Decl., Ex. A). Petitioners argue that although the Chief Judge signed a denial on April 30, 1997, it did not become effective until May 15, 1997, fifteen days later, because four other justices did not join in the disposition.

California Rule of Court 28(f) provides:

> Review by the [California] Supreme Court of a decision of a Court of Appeal may be granted by an order, signed by at least four judges, and filed with the clerk. The denial of review may be evidenced by an order signed by the Chief Justice and filed with the clerk. If no order is made within the time [within which the Court may order review], the petition shall be deemed denied and the clerk shall enter a notation in the register to that effect.

Rule 28(f) requires four justices to sign an order *granting* review, not orders *denying* review. For denials, such as the one issued to petitioners, the Chief Justice's signature is sufficient. The docket reflects this understanding as it shows the petition was denied on April 30, 1997. Accordingly, the denial became effective on April 30, 1997—"the date upon which review [was] denied."

2. Equitable Tolling

Petitioners argue that, even if they failed to file within the statute of limitations, the Court should equitably toll the limitations period to May 15, 1998. Respondent argues that the circumstances surrounding petitioners' late filings do not warrant

application of the equitable tolling doctrine. For the purposes of this motion, the Court will assume that the California Supreme Court did not mail, and petitioners' counsel did not receive, the April 30, 1997 order denying habeas relief.[1]

The AEDPA's one year statute of limitations is subject to equitable tolling. Calderon v. USDC (Beeler), 128 F.3d 1283, 1288 (9th Cir. 1997), overruled on other grounds, 1998 WL 848032, *11-12 (9th Cir., Dec. 8, 1998). Equitable tolling is available only where "'extraordinary circumstances' beyond a prisoner's control make it impossible to file a petition on time." Id. (citation omitted). District judges should only "authorize extensions when this high hurdle is surmounted." Id. at 1289. Because the purpose of the statute of limitations is to "accelerate the federal habeas process," the Ninth Circuit has concluded that "[e]quitable tolling will not be available in most cases." Id. at 1288-89.

Neither party has cited nor has the Court found any habeas case discussing whether equitable tolling is justified when a court fails to mail notice of a judgment to the parties. As respondent points out, however, the Ninth Circuit, has addressed the question of notice in the context of an untimely appeal from a district court judgment, and the court has made clear that "mere failure of the clerk to notify the parties that judgment has been entered does not provide grounds for excusable neglect or warrant an extension of time."[2] Alaska Limestone Corp. v. Hodel, 799 F.2d 1409, 1412 (9th Cir. 1986); see Stevens v. ITT Systems, 868 F.2d 1040, 1041-42 (9th Cir. 1989) (no excusable neglect when counsel

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[1] Accordingly, as the Court reads this factual issue in petitioners' favor, it is unnecessary for the Court to address petitioners' request for an evidentiary hearing and objections to evidence.

[2] A district court may grant relief from an untimely appeal in cases of "excusable neglect." Fed. Rule Civ. P. 60(b) and Fed. Rule App. P. 4(a)(1).

knew judgment would soon be entered against client and failed to check with district court until after time for appeal had expired); Kramer v. American Postal Workers Union, 556 F.2d 929, 930-31 (9th Cir. 1977) (no excusable neglect when counsel knew judgment would soon be entered, failed to contact court for three months, and "unquestioning[ly] reli[ed] on the lack of notice" from the district court).[3]

Rather, to demonstrate "excusable neglect," counsel must act with "due diligence in ascertaining whether judgment ha[s] been entered." Stevens v. ITT, 868 F.2d at 1041; see Zurich Ins. Co. v. Wheeler, 838 F.2d 338, 340 (9th Cir. 1988) (excusable neglect satisfied when counsel called district court clerk and was informed no judgment had been entered); Rodgers v. Watt, 722 F.2d 456, 458-59 (9th Cir. 1983) (excusable neglect satisfied where counsel thrice checked clerk's docket for entry of judgment, but clerical error in docket made it appear as though judgment had not yet been entered). The Ninth Circuit has so held, notwithstanding Federal Rule of Civil Procedure 77(d), which requires the court to immediately mail notice of entry of judgment to the parties. Stevens v. ITT, 868 F.2d at 1041.

In the instant case, petitioners' counsel placed

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[3] The Court is mindful that the law, as it presently stands, no longer requires a party filing an untimely appeal to demonstrate excusable neglect if the party did not receive actual notice of the district court judgment. See Nunley v. City of Los Angeles, 52 F.3d 792, 798 (9th Cir. 1995) ("[T]he concept of excusable neglect has no place in the application of Rule 4(a)(6)."). The Court is also aware that "excusable neglect," as applicable in other contexts, now "'encompasses both simple, faultless omissions to act and, more commonly, omissions caused by carelessness.'" Marx v. Loral Corporation, 87 F.3d 1049,1053-54 (9th Cir. 1996) (quoting Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd., 507 U.S. 380, 388, 113 S. Ct. 1489, 1495 (1993)). Nevertheless, the excusable neglect standard, as analyzed in the Ninth Circuit cases discussed above, provides guidance in applying the "extraordinary circumstances" standard applicable to the instant case.

unquestioning reliance on the lack of notice from the district court. Like counsel in Alaska Limestone, Stevens and Kramer, petitioners' attorney knew approximately when the judgment would be entered but never checked with the court to ascertain the actual date of entry. Moreover, petitioners' counsel had a full year to call the docket clerk, while the attorneys in Alaska Limestone, Stevens and Kramer had only thirty or sixty days.

The provision of Rule 24(a), California Rules of Court, requiring the California Supreme Court to mail copies of judgments to parties, does not change this conclusion. Just as counsel's reliance in Stevens on a similar rule, Federal Rule of Civil Procedure 77(d), did not excuse his failure to timely file, counsel's reliance on Rule 24(a) likewise will not serve to excuse the untimely filings herein.

Further, contrary to petitioners' argument, Rule 28(f) of the California Rules of Court which provides for denial by operation of law, does not entitle petitioners to assume that their petitions were "deemed denied" on May 15, 1997 when no notice was received. Making the assumption that the petitions were deemed denied is not significantly different than assuming a judgment was not entered, which the above cases demonstrate is not excusable. Indeed, petitioners' assumption is even less justifiable when one considers the California Supreme Court's practice of expressly granting or denying all petitions, despite Rule 28(f) which allows the court to do otherwise. (Wandruff Decl., ¶ 2).

Under the circumstances, petitioners have failed to make a showing of excusable neglect as that standard was defined and applied in the Ninth Circuit cases discussed above. As petitioners have failed to meet that standard, they also fail to meet the extraordinary circumstances standard applicable to the instant case.

Petitioners reliance on Hopi Tribe v. Navajo Tribe, 46 F.3d 908 (9th Cir., 1995), in support of equitable tolling, is misplaced. In Hopi Tribe, the Ninth Circuit held that the BIA violated the due process rights of the Navajo Nation by failing to

provide adequate notice of the BIA's land valuation, and thus, concluded that the appeal therefrom was timely. Hopi at 917-19. The Ninth Circuit based its decision on a regulation which explicitly extended the time to appeal in the absence of notice. See Id. at 918 (discussing 25 C.F.R. § 2.4 (1985)). Unlike the regulation in Hopi, Rule 24(a) of the California Rules of Court, does not extend the time for appeal when notice is not provided. See People v. Perry, 223 Cal. App. 2d 466, 36 Cal. Rptr. 16 (1963) (failure to mail notice of judgment does not extend time for appeal). Furthermore, unlike Hopi Tribe, petitioners here point to no specific representations by respondent on which they relied.

Petitioners also cite Supermail Cargo v. United States, 68 F.3d 1204 (9th Cir. 1995). Supermail Cargo is inapposite, because, unlike respondent in the instant case, the respondent in Supermail Cargo affirmatively mislead petitioners with respect to the time for filing. Id. at 1205.

Finally, petitioners argue that cases involving the initial, direct appeal from a criminal conviction are analogous to the instant matter. In the context of first appeals from criminal convictions, an attorney's failure to file a timely appeal generally constitutes ineffective assistance of counsel. See United States v. Horodner, 993 F.2d 191, 195 (9th Cir. 1993) (attorney's late appeal "prejudiced [defendant] in violation of his Sixth Amendment rights."); Lozada v. Deeds, 964 F.2d 956, 958-59 (9th Cir. 1992) (prejudice is presumed if attorney's failure to appeal is without petitioner's consent). As petitioners have a constitutional right to counsel for the first appeal, but not for habeas proceedings (Pennsylvania v. Finley, 481 U.S. 551, 555 (1987)), the Court finds petitioners' reliance on first appeal cases misplaced.

For the foregoing reasons, the Court finds that petitioners have failed to demonstrate that extraordinary circumstances made it impossible to file the petitions on time. Accordingly, the Court declines to equitably toll the statute of limitations and GRANTS respondent's motion to dismiss.

IT IS SO ORDERED.

Dated: DEC 28 1998

/s/

MAXINE M. CHESNEY
United States District Judge

Filed January 15, 1997
Supreme Court
Robert Wandruff Clerk
Deputy

First Appellate District, Division Three, No. A068537
S049538

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Respondent,

v.

KEVIN L. PHELPS Et Al., Appellants

Appellant's petition for review DENIED.

/s/

Chief Justice

Filed March 27, 1997
Supreme Court
Robert Wandruff Clerk
Deputy

First Appellate District, Division Three, No. A076258
S059148

IN THE SUPREME COURT OF CALIFORNIA
In Re KEVIN L. PHELPS, on Habeas Corpus

The time for granting or denying review in the above cause is hereby extended to and including May 15, 1997, or the date upon which review is either granted or denied.

/s/

Chief Justice

Filed April 30, 1997
Supreme Court
Robert Wandruff Clerk
Deputy

First Appellate District, Division Three, No. A076258
S059148

IN THE SUPREME COURT OF CALIFORNIA

In re KEVIN L. PHELPS on Habeas Corpus

Petition for review DENIED on the merits.

/s/

Chief Justice

Filed October, 28, 1996

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,
Plaintiff and Respondent,

v.

KEVIN L. PHELPS et al.,
Defendants and Appellants.

A068537

(Contra Costa County Super. Ct. No. 940642-2)

After three trials, appellants Kevin L. Phelps and Jason P. Dorton were convicted of murdering Mark Crosby. The first two trials ended in hung juries. Appellants contend the trial court erroneously denied their motion for a new trial. The motion was based on newly discovered evidence in the form of testimony from an eyewitness whom Phelps met in jail after the third trial. We conclude the motion was properly denied and affirm the judgment.

BACKGROUND

1. *The Evidence at Trial*

On the afternoon of February 15, 1993, Mark Crosby was visiting some people in a front yard on Lucas Street in Richmond. Four men in a Peugeot pulled up and accosted him. Crosby immediately rode away on his bicycle and turned down Seventh Street. The Peugeot proceeded to the corner of Seventh and Lucas where all four occupants began shooting at Crosby. The driver and left rear

passenger leaned out of their windows and the two passengers on the right side fired over the roof of the car. Crosby was hit in the back of the head and fell to the ground.

The police found 9 millimeter and .223 caliber shell casings at the scene of the crime. Two 9 millimeter casings were located in the right front passenger area of the Peugeot when the car was found parked on a Richmond street the day after the shootings. Crosby's wound was most consistent with the kind of damage inflicted by a high velocity bullet fired from a rifle. A .223 caliber weapon could have inflicted the wound. The police found a Big Five Sporting Goods receipt in the Peugeot for five boxes of .223 ammunition. The receipt was dated the day. before the shooting.

The police recovered a Ruger P-85 semi-automatic pistol with a loaded magazine, a box of 9 millimeter ammunition, and a paper bag containing .223 ammunition in searches of Phelps' residence. The Ruger P-85 had fired the two 9 millimeter casings found in the Peugeot and six of the casings found at the crime scene. The .223 casings recovered at the scene had all been fired from one rifle, probably a Ruger mini-14. Five of the .223 cartridges found in the paper bag had been chambered in the same rifle but had not been fired. That weapon had also fired casings found in a carport at another address where Phelps lived when police responded to reports of gunfire on January 19, 1993.

The police performed a gunshot residue test on appellant Dorton's hands on the evening of the shooting. The test yielded a particle that could have been gunshot residue. When Dorton was arrested at around 5 p.m. on the afternoon of the shooting, he said to Officer Ward of the Richmond Police Department, "Ward, man, we got to get out of here. They are saying that we killed Mark Crosby over on Seventh Street." Dorton denied knowing anything about the killing when interviewed at the police station later that same afternoon.

An associate of appellants' named Mondrell "Mooch" Johnson had rented the Peugeot from Troy

Olsen in February 1993 in exchange for crack cocaine. Phelps was present at the transaction. Another associate of appellants', Derrick Pride, was identified by a store clerk from Big Five Sporting Goods as one of four men who together had purchased the .223 ammunition the day before Crosby was shot.

Appellants were identified by Jonathan Robinson as two of the shooters in the Peugeot. Robinson was one of the persons Mark Crosby had been visiting on Lucas Street just before the murder. Robinson was unavailable at trial, but the prosecution read his testimony from the second trial to the jury. The jury also saw a videotape of Robinson's interview with the police on the day Crosby was killed.

Robinson had gone to Crosby's aunt's house at Sixth and Lucas after the shooting, where he spoke to Officer Ward. Robinson told Ward that Phelps had killed Crosby. A short time later Robinson picked Phelps and Dorton out of photo lineups. Robinson testified Phelps was in the right front seat of the Peugeot and had asked Crosby, "What's happening?" when the car pulled up on Lucas Street. Dorton was seated behind the driver. (In his initial interview with the police, Robinson described the person behind the driver as dark-skinned, but in court he said he had described him as light-skinned. Dorton is a light-skinned African-American.) Robinson did not recognize the other two occupants. However, a few days later Phelps's brother Lee was shot to death and Robinson called the police to tell them he had seen Lee's picture in the newspaper. He told the police he recognized Lee Phelps as the.right rear passenger in the Peugeot.

Robinson confirmed his identification of appellants at trial. He said Phelps had used "some type of assault weapon," and the others had used 9 millimeter weapons. All the weapons were handguns. Phelps was wearing a white baseball cap turned backwards and Dorton a black ski mask and black jacket. Dorton was wearing a black jacket when he was arrested on the evening of the shooting.

and Robinson identified the jacket as the one Dorton had on during the shooting. Robinson knew Crosby from having worked with him in a barber shop, and knew appellants from the neighborhood. Phelps had robbed him once.

Robinson was reluctant to testify because he and his family had been threatened. (The judge instructed the jury that Robinson's testimony about threats was not offered for the truth of the matter but only to show Robinson's state of mind.) A half-brother of Robinson's was killed about six months after Crosby's death and several people told Robinson he was the intended target. At that point Robinson approached the police and asked for help. They gave him $800 to relocate, and he went to Texas. Robinson had not appeared at the first trial and was in court for the second only because he had been arrested. He claimed to have met Phelps in the court holding cell where Phelps offered him money or drugs not to testify. Robinson admitted felony convictions for narcotics sales and possession of a weapon by a felon and was currently on probation for possession of stolen property.

The prosecution's theory was that Mark Crosby's murder was part of a feud between a group associated with Third and Main Streets and a group associated with the Parchester neighborhood. Appellants belonged to the Third and Main group. Mark Crosby belonged to the Parchester group. Harold Oliver of Third and Main was murdered in late 1991, and members of the Parchester group were the suspected perpetrators. In June 1992, Derrick Brice of Third and Main shot Mark Crosby and Terrain Miller of Parchester. Brice was himself shot twenty minutes later. A few weeks after that Amad Sahn of Parchester shot John Wayne Foutenot of Third and Main. On February 6, 1993, Craig Bowen of Third and Main drove by a memorial service for a murdered Parchester associate and made a gesture of some sort, possibly with a firearm. Later that day Mark Crosby's brother Anthony fired shots at the Phelps residence, held a gun to the head of Kevin Phelps' cousin Rachelle, and threatened to kill her.

Nine days later, Mark Crosby was killed, and three days after that Lee Phelps was killed.

Appellants presented an alibi defense. Defense witnesses testified appellants were at Third and Main on the corner or in a nearby apartment when Mark Crosby was murdered. On November 17, 1994, the jury found Phelps guilty of first degree murder and Dorton guilty of second degree murder.

2. ***The New Trial Motion***

On December 9, 1994, appellants filed, a motion for a new trial based on newly discovered evidence. They attached a declaration from Edward Lee Turner, who witnessed the shooting of Mark Crosby. They also attached a copy of the police report of Turner's interview at the police station on the day of the shooting. In his declaration, Turner stated he had disappeared after the interview because there were warrants out for his arrest. He was arrested on November 16, 1994, met Kevin Phelps for the first time in jail, and agreed to speak with defense counsel. Turner had been a passenger in a car driven by his friend, Carolyn Morgan, on the afternoon of the murder. Approaching the comer of Eighth and Lucas Streets, they had passed a gold car. When they stopped at the comer the gold car pulled away making a screeching noise and Turner looked back at the driver and front passenger. John Robinson and Mark Crosby were standing near the comer. Morgan turned right onto Lucas heading toward Seventh Street. Turner saw Crosby riding his bike in a hurry. The gold car then passed Morgan's car and stopped near the comer of Seventh and Lucas. Turner heard someone shout something like, "Mark, it's your turn." The driver and left rear passenger began shooting at Crosby with 9 millimeter handguns. The right side passengers stood on the street shooting over the Peugeot toward Crosby. The front passenger used a 9 millimeter handgun, while the right rear passenger used a long AK-47 or M-1 rifle.

Turner declared he got the best look at the right rear passenger, whom he described as tall and light-skinned with a mustache and possible goatee,

wearing a black cap and Raiders jacket. This man had looked directly at Turner and Turner was afraid he would shoot him. Morgan had shouted at Turner to get down, but the car was too small and Turner kept looking out the windshield. The right front passenger was tall, had his hair in corn rows, and wore a long black canvas jacket. Turner did not see the left passenger's face but saw his hand extended out the window and his skin was very dark. Spent casings flew onto the hood of Morgan's' car. When the police arrived Morgan and Turner followed directions to move the car. Turner knew Officer Ward, who told him to go to the station for an interview. Turner did so and was interviewed by Officer Williams. There were many interruptions during the interview and Turner did not want to get involved so he only answered questions and volunteered nothing. He had seen John Robinson's car near the station and did not want to get involved with him because he did not associate with Robinson's group. Turner was shown two photo lineups and could not identify any shooters in them. He was asked to describe the shooters, but was interrupted before he could describe the front passenger. He knew the police, the District Attorney, and investigators for the defense were looking for him after the interview but avoided them. After meeting Phelps in jail he was certain Phelps was not the right front or right rear passenger in the Peugeot.

When interviewed by police on the day of the shooting, Turner told them that he and Morgan had encountered the gold Peugeot double-parked on Lucas near Eighth. The right front and right rear passengers of the Peugeot were talking to Crosby. The Peugeot passed by and stopped at the comer of Seventh, where the firing began. The right rear passenger used an AK-47 type assault weapon while the others had handguns. The Peugeot driver was dark with short curled hair; the left rear passenger wore all black; the right rear passenger was light with a possible mustache and goatee, black Raiders jacket and black cap, and medium build. The report notes that Turner did not describe the right front

passenger. Turner was given photo lineups numbered 1 and 4, which contained photos of the appellants, and he could not identify the occupants of the Peugeot.

The new trial motion was also supported by declarations from defense counsel and a defense investigator, stating they had unsuccessfully tried to locate Turner before his arrest. They had visited Turner's grandmother's house, asked people in the neighborhood, and checked county jails and court records.

The prosecution responded to the new trial motion by arguing (1) the evidence was not newly discovered because the defense was aware from the beginning that Turner was an eyewitness who failed to identify appellants; (2) the defense did not exercise due diligence in locating Turner; and (3) Turner was not a credible witness, since in his interview on the day of the crime he had failed to supply the descriptive details he was now providing regarding the front and left rear passengers.

Turner appeared at the hearing on the motion and was cross-examined by the prosecution. He admitted having three convictions for assault and a pending trial on charges of robbery and cocaine possession. He said he was in Dunnigan, California during much of the time since Crosby's killing, but from March until August 18, 1993, he was incarcerated in the county jail in Martinez. He was released on probation and stayed out of sight, going between Richmond and Dunnigan, where his stepmother had a farm. He did not tell his probation officer he was in Dunnigan, but the Probation Department probably had the address as part of his family background information. He spoke with his probation officer on the phone and left him messages but never met him. When in Richmond he stayed with his brother, sister, or aunt. He was arrested in July 1994, held for around 20 days, then released again until his latest arrest on November 16.

Turner testified that when he spoke to the police on the day of the shooting he told them "what I felt was substantial at the time." He remembered

giving detailed descriptions of the driver and right rear passenger, but not of the other two men in the Peugeot. He did not remember reporting a conversation between Crosby and the men in the car, and he did not currently remember such a conversation. He thought his memory of the events was better now than it was on the day in question. The court heard a tape recording of Turner's interview with the police, which lasted thirteen minutes.

Defense counsel argued Turner's testimony was more accurate than Robinson's, since Turner described the type of weapon that killed Crosby while Robinson did not. Counsel noted the tape showed Turner was not asked about the right front passenger. Counsel contended a fourth trial was warranted so a jury could consider Turner's version of the events.

The prosecutor asserted the tape of Turner's interview showed he was anything but a reluctant witness. He was eager to provide information and asked for money in return. The tape recorded Turner's report of an argument between Crosby and the men in the Peugeot. The prosecutor also emphasized that Turner, who had only one eye, had made it clear that the only shooter he saw well enough to identify was the right rear passenger. The prosecutor doubted Turner's claim that his memory had improved over the nearly two years since the incident. Finally, the prosecutor noted the defense had the tape of Turner's interview from the beginning and failed to exercise due diligence in finding him. Turner had been in the local jail before and during the second trial which was held at the beginning of August 1994, but the defense had neglected to find him despite claiming to have checked the jails. The defense had not asked the prosecution for information on Turner's location. Defense counsel explained they had to share one investigator who was very busy during the second trial.

The trial court denied the motion for a new trial. It ruled that Turner's testimony was not really

new evidence because his earlier taped interview had been known by the defense. The court also found Turner's testimony lacked credibility since what he said shortly after the "harrowing experience" of being "virtually in the direct line of fire" was "obviously much more likely to have been truthful, rather than his testimony that he has given very nearly two years after the event."

DISCUSSION

The trial court considers the following factors when ruling on a motion for new trial based on newly discovered evidence: (1) The evidence, not merely its materiality, must be newly discovered; (2) the evidence must not be merely cumulative; (3) the evidence must make a different result probable on retrial; (4) the party must have been unable to discover and produce the evidence at trial with reasonable diligence; and (5) these factors must be established by the best evidence the circumstances permit. The trial court's determination of the motion will not be disturbed unless a clear abuse of discretion is shown. (*People* v. *Beeler* (1995) 9 Cal.4th 953, 1004; *People* v. *Delgado* (1993) 5 Cal.4th 312, 328.)

The trial court's finding that Turner's proffered new testimony lacked credibility was an implicit determination that a different result was not probable on retrial. (See *People* v. *Delgado, supra,* 5 Ca1.4th at p. 329.) Appellants' contention that it was error for the trial court to assess Turner's credibility is specious. In the first place, appellants invited the trial court to make that assessment in their moving papers, citing *People* v. *Jefferson* (1956) 47 Ca1.2d 438. Furthermore, it is beyond dispute that the trial court may consider the credibility of newly discovered evidence in determining whether its introduction at a new trial would render a different result reasonably probable. The courts authority to do so is not limited to cases involving accomplice testimony or recantation of prior testimony, as appellants suggest. Credibility determinations are inherent in ascertaining whether new evidence is sufficient to change the result. (*People* v. *Delgado, supra,* 5

Ca1.4th at p. 329; *People* v. *Jefferson, supra,* 47 Ca1.2d at p. 446; *People* v. *Minnick* (1989) 214 Cal.App.3d 1478, 1482; *People* v. *Cole* (1979) 94 Cal.App.3d 854, 860, disapproved on other grounds by *In re Kelly* (1983) 33 Ca1.3d 267, 277; *People* v. *Beyea* (1974) 38 Cal.App.3d 176, 202.)

The court found the new details in Turner's testimony were not believable because they were inconsistent with his original report to the police. On the day of the shooting Turner was only able to describe the right rear passenger in detail. He described the left rear passenger only by his black clothing, which was consistent with the black jacket worn by appellant Dorton, and gave no description at all of the front passenger. Appellants complain the trial court erroneously placed Turner and Morgan in the line of fire when they were actually behind the shooters. However, the trial court's findings that Turner had been "virtually in the direct line of fire" and that his original report was the result of a "harrowing experience" are supported by Turner's testimony; Turner testified that ejected shells landed on Morgan's car, that Morgan had been frantically trying to get him to duck down, and that he himself had been afraid the right rear passenger would shoot him.

Appellants also argue Turner's testimony was at least as credible as Robinson's. They note both men were convicted felons avoiding the authorities and both were informants. The point to various inconsistencies Robinson's testimony. We note Turner sought to be paid for his information in his initial interview, whereas Robinson asked for money to relocate only after he believed his life was in danger. Moreover, Turner's testimony on the key question of identity changed after he met appellants, nearly two years after the events. Although Robinson initially misdescribed Dorton's skin tone, he positively identified both appellants in photo lineups on the day of the shootings and maintained that identification in his trial testimony. The trial court heard the evidence at trial, including the videotape of Robinson's police interview. It also heard the

audiotape of Turner's police interview and is testimony at the new trial motion. In determining whether appellants were prejudiced by their inability to present Turner's latest version of the events, we must accord considerable deference to the trial court because of its observation of the witnesses and superior opportunity to get "the feel of the case." (*People* v. *Shoals* (1992) 8 Cal.App.4th 475, 488; *People* v. *Hayes* (1985) 172 Cal.App.3d 517, 524-525, internal quotation marks omitted.) There was no abuse of discretion in finding the new details in Turner's testimony insufficiently credible to warrant a new trial.

Because we conclude that a new trial was properly denied based on the improbability of a different outcome resulting from Turner's testimony, we need not consider whether the defense exercised reasonable diligence in locating Turner before trial. The trial court made no finding on this point. We note, however, that during the second trial, which was the only trial at which Robinson testified in person, Turner (like Robinson) was incarcerated in the county jail. Thus, the opportunity for the jury to compare the two men's testimony was available to the defense at the second trial. We are satisfied appellants had a fair trial on the merits and Turner's newly recalled observations would not reasonably and probably have led to a different result on retrial. (See *People* v. *Martinez* (1984) 36 Cal.3d 816, 825-826; *People* v. *Dyer* (1988) 45 Cal.3d 26, 51-52.)

DISPOSITION

The judgment is affirmed.

Parrilli, J.

We concur:

Phelan, P.J.

Corrigan, J.

Filed February 6, 1997
Court of Appeal – First App. Dist.
RON D. BARROW, CLERK

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

IN RE LEVIN L. PHELPS,
On Habeas Corpus

A076258
(ALAMEDA County Super. Ct. No. 940642-2)

BY THE COURT:

The petition for habeas corpus is denied. Petitioner's claim of ineffective assistance of counsel are barred because they could have been presented on appeal, but were not. (In re Harris (1993) 5 Cal.4th 813, 829.) (Phelan, P.J., Carrigan, J. and Parrilli, J. participated in the decision)

DATED: February 6, 1997

/s
_____ P.J.

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